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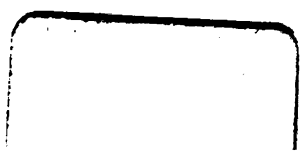
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**REPORTS**  
**OF**  
**CASES ARGUED AND ADJUDGED**  
**IN**  
**THE SUPREME COURT**  
**OF**  
**THE UNITED STATES.**

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**DECEMBER TERM, 1858.**

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**By BENJAMIN C. HOWARD,**  
**COUNSELLOR AT LAW AND REPORTER OF THE DECISIONS OF THE SUPREME**  
**COURT OF THE UNITED STATES.**

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**VOL. XXI.**

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**THE BANKS LAW PUBLISHING CO.,**  
**21 MURRAY STREET, NEW YORK**  
**1908**

Entered according to Act of Congress, in the year 1859, by  
**BENJAMIN C. HOWARD,**  
in the Clerk's Office of the District Court of the District of Columbia.



## SUPREME COURT OF THE UNITED STATES

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HON. ROGER B. TANEY, Chief Justice.  
HON. JOHN McLEAN, Associate Justice.  
HON. JAMES M. WAYNE, Associate Justice.  
HON. JOHN CATRON, Associate Justice.  
HON. PETER V. DANIEL, Associate Justice.  
HON. SAMUEL NELSON, Associate Justice.  
HON. ROBERT C. GRIER, Associate Justice.  
HON. JOHN A. CAMPBELL, Associate Justice.  
HON. NATHAN CLIFFORD, Associate Justice.

JEREMIAH S. BLACK, Esq., Attorney General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

WILLIAM SELDEN, Esq., Marshal.

### ADMIRALTY RULE.

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*Ordered*, That the twelfth rule of practice prescribed by this court at December term, 1844, (3d vol. Howard's Rep., 3,) in causes of admiralty and maritime jurisdiction be, and the same is hereby, repealed, and the following rule of practice is substituted in its place :

"In all suits by material men for supplies or repairs, or other necessaries, for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, or other necessaries."

This order to take effect, and be in force, from and after the first day of May, 1869.

**R U L E S**  
**OF THE**  
**SUPREME COURT OF THE UNITED STATES,**

**REVISED AND CORRECTED AT DECEMBER TERM, 1858.**

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**No. 1.**  
**CLERK.**

The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice either as an attorney or counsellor in this court, or any other court, while he shall continue to be clerk of this court.

The clerk shall not permit any original record or paper to be taken from the Supreme Court room, or from the office, without an order from the court.

**No. 2.**  
**ATTORNEYS, ETC.**

It shall be requisite to the admission of attorneys and counsellors to practice in this court, that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

They shall respectively take the following oath or affirmation, viz: "I do solemnly swear (or affirm, as the case may be) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law, and that I will support the Constitution of the United States."

**No. 3.**  
**PRACTICE.**

This court consider the practice of the Courts of King's Bench and of Chancery, in England, as affording outlines for

the practice of this court; and they will, from time to time, make such alterations therein as circumstances may render necessary.

No. 4.

BILL OF EXCEPTIONS.

Hereafter, the judges of the Circuit and District Courts shall not allow any bill of exceptions, which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepted; and that such matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.

No. 5.

PROCESS.

All process of this court shall be in the name of the President of the United States.

When process at common law, or in equity, shall issue against a State, the same shall be served on the Governor, or Chief Executive Magistrate, and Attorney General, of such State.

Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.

No. 6.

MOTIONS.

All motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

No. 7.

LAW LIBRARY—CONFERENCE ROOM.

1. During the session of the court, any gentleman of the bar having a cause on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same

(not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. And it shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; as also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one, except the judges of the court.

No. 8.

RETURN TO WRIT OF ERROR, ETC.

1. The clerk of the court to which any writ of error shall be directed may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court.

2. No cause will hereafter be heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

3. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court, upon appeal, such presiding judge may make such rule or order for the safe keeping, transporting, and return, of such original papers, as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

No. 9.

DOCKETING CASES.

1. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered

thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed, upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal has been duly sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may at his option docket the cause, and file a copy of the record with the clerk of the court; and if the case is docketed, and a copy of the record filed with the clerk of this court, by the plaintiff in error or appellant, within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee, at any time thereafter during the term, the case shall stand for argument at the term.

3. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah.

#### No. 10.

#### SECURITY FOR COSTS—PRINTING RECORDS—ATTACHMENT FOR COSTS.

1. In all cases, the clerk shall take of the party a bond, with competent surety, to secure his fees, in the penalty of two hundred dollars, or a deposit of that amount, to be placed in bank, subject to his draft.

2. In all cases, the clerk shall have fifteen copies of the

## RULES OF THE COURT.

ix

records printed for the court; and the cost of printing shall be charged to the Government, in the expenses of the court.

3. The clerk shall furnish copies for the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required.

4. In each case, the clerk shall charge the parties the legal fees for but the one manuscript copy in that case.

5. In all cases, the clerk shall deliver a copy of the printed record to each party. And in cases of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.

6. In cases of dismissal for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.

7. Upon the clerk of this court producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them respectively in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said fees

### No. 11.

#### TRANSLATIONS.

Whenever any record, transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record,

### No. 12.

#### EVIDENCE.

1. In all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission

# RULES OF THE COURT.

to be issued from this court, or from any Circuit Court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however*, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

## No. 13.

DEEDS, ETC., NOT OBJECTED TO, ETC., ADMITTED, ETC.

In all cases of equity and admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record, as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

## No. 14.

CERTIORARI.

No *certiorari* for diminution of the record shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing; and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* shall be made at the first term of the entry of the cause; otherwise, the same shall not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

## No. 15.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the person.



alty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit; and thereupon the cause shall be heard and determined, as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the same reversed, if it be erroneous; *Provided, however*, that a copy of every such order shall be printed in some newspaper at the seat of Government, in which the laws of the United States shall be printed by authority, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

No. 16.

NO APPEARANCE OF PLAINTIFF IN ERROR.

Where there is no appearance for the plaintiff in error when the case is called for trial, the defendant may have the plaintiff called, and dismiss the writ of error, or may open the record, and pray for an affirmance.

No. 17.

NO APPEARANCE OF DEFENDANT IN ERROR.

Where the defendant in error fails to appear when the cause shall be called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the cause.

No. 18.

NO APPEARANCE OF EITHER PARTY.

When a case is reached in the regular call of the docket, and no appearance is entered for either party, the case shall be dismissed, at the costs of the plaintiff.

# RULES OF THE COURT.

## No. 19.

### NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the costs of the plaintiff, unless sufficient cause is shown for further postponement.

## No. 20.

### PRINTED ARGUMENTS.

1. In all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments, without regard to the number of the case on the docket, if the counsel on both sides shall choose so to submit the same. But the arguments must be filed within the first ten days of the term, and signed by attorneys or counsellors of this court.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

## No. 21.

### TWO COUNSEL—TWO HOURS—BRIEFS.

1. Only two counsel shall be permitted to argue for each party, plaintiff and defendant, in a cause.

2. No counsel will be permitted to speak in the argument of any case more than two hours, without the special leave of the court, granted before the argument begins.

3. Counsel will not be heard, unless a printed brief or abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points; and no other book or case be referred to in the argument.

4. The same shall be signed by an attorney or counsellor of this court.

5. If one of the parties omits to file such a statement, he

cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the statement is filed.

6. Fifteen printed copies of the abstract, points, and authorities, required by this rule, shall be filed with the clerk three days before the case is called for argument; nine of these copies for the court, one for the reporter, one to be retained by the clerk, and the residue for counsel.

7. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party. But if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

No. 22.

ORDER OF ARGUMENT.

The plaintiff or appellant in this court shall be entitled to open and conclude the case. But, when there are cross-appals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

No. 23.

INTEREST, ETC.

1. In cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

2. The same rule shall be applied to decrees for the payment of money in cases in chancery, unless otherwise ordered by this court.

3. In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded, at the rate of *ten per centum per annum* on the amount of the judgment; and the said damages shall be calculated from the date of the judgment in the court below until the money is paid.

No. 24.

COSTS.

1. In all cases where any suit shall be dismissed in this court,

## RULES OF THE COURT.

except where the dismissal shall be for want of jurisdiction, costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error, or appellee, as the case may be, unless otherwise ordered by the court.

3. In all cases of reversals of any judgment or decree in this court, costs shall be allowed in this court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court.

4. Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

## No. 25.

## OPINIONS OF THE COURT.

1. All opinions delivered by the court shall immediately, upon the delivery thereof, be delivered over to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver the originals, with a transcript of the judgment or decree of the court thereon, to the reporter, as soon as the same shall be recorded.

2. And all the opinions of the court, as far as practicable, shall be recorded during the term, so that the publication of the reports may not be delayed thereby.

3. The original opinions of the court, delivered to the reporter, shall be filed in the office of the clerk of the court, for preservation, as soon as the volume of reports for the term, at which they are delivered, shall be published.

**No. 26.****CALL OF THE DOCKET.**

The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term, in the same order; and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the cause shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court. That ten causes only shall be considered as liable to be called on each day during the term, including the one under argument, if the same shall not be concluded on the preceding day. No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every cause which shall have been called in its order, and passed, and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

**No. 27.****MOTION DAY.**

The court will not hear arguments on Saturday, (unless for special cause it shall order to the contrary,) but will devote that day to the other business of the court; and on Friday in each week, during the sitting of the court, motions in cases not required by the rules of the court to be put on the docket shall be entitled to preference, if such motions shall be made before the court shall have entered on the hearing of a cause upon the docket.

**No. 28.****ADJOURNMENT.**

The court will, at every session, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

## No. 29.

## DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall at any time hereafter, in vacation and out of term time, by their respective attorneys, who are entered as such on the record, sign and file with the clerk an agreement in writing, directing the case to be dismissed, and specifying the terms upon which it is to be dismissed as to costs, and also paying to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party which may request it a copy of the agreement filed; but no mandate or other process is to issue without an order by the court.

# LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1858.

C. R. WAUGH,	<i>New Jersey.</i>
THOMAS DONALDSON,	<i>Maryland.</i>
ALFRED RUSSELL,	<i>Michigan.</i>
A. W. RANDALL,	<i>Wisconsin.</i>
S. A. SMITH,	<i>Tennessee.</i>
HENRY R. MYGATT,	<i>New York.</i>
GEORGE H. PENDLETON,	<i>Ohio.</i>
M. WHIT. SMITH,	<i>Florida.</i>
DANIEL P. HOLLAND,	<i>Florida.</i>
A. H. GREENE,	<i>New York.</i>
SIMON STEVENS,	<i>Pennsylvania.</i>
R. ST. CLAIR GRAHAM,	<i>Kansas.</i>
T. PARKIN SCOTT,	<i>Maryland.</i>
CORNELIUS MCLEAN,	<i>Maryland.</i>
ALFRED B. MCCALMONT,	<i>Pennsylvania.</i>
JUSTUS J. MCCARTY,	<i>New Mexico.</i>
JAMES H. HOPKINS,	<i>Pennsylvania.</i>
ALEXANDER H. BROWN,	<i>South Carolina.</i>
NELSON MITCHELL,	<i>South Carolina.</i>
RICHARD BUTLER,	<i>Michigan.</i>
JAMES CONNER,	<i>South Carolina.</i>
SAMUEL R. CURTIS,	<i>Iowa.</i>
DAVID McDONALD,	<i>Indiana.</i>
PERRY H. SMITH,	<i>Wisconsin.</i>
N. ST. JOHN GREEN,	<i>Massachusetts.</i>
WILLIAM H. HULL,	<i>Georgia.</i>
T. S. PHILLIPS,	<i>Kentucky.</i>
WILLIAM W. KINGSBURY,	<i>Dacotah Territory.</i>
A. J. EDGERTON,	<i>Minnesota.</i>
JOHN WILSON,	<i>Illinois.</i>
GEORGE NORTROP,	<i>Pennsylvania.</i>
HORACE MAYNARD,	<i>Tennessee.</i>
JOHN E. HANNA,	<i>Ohio.</i>
HORATIO F. AVERILL,	<i>New York.</i>
DENNIS F. MURPHY,	<i>Pennsylvania.</i>
BERNARD ROELKER,	<i>New York.</i>

C. GIBSON,	<i>Missouri.</i>
WILLIAM KELLOGG,	<i>Illinois.</i>
EDMUND PENDLETON,	<i>Ohio.</i>
H. A. NELSON,	<i>New York.</i>
JOHN S. NEWBERRY,	<i>Michigan.</i>
GEORGE SHEA,	<i>New York.</i>
VINCENT L. BRADFORD,	<i>Pennsylvania.</i>
F. F. MARBURY,	<i>New York.</i>
WILLIAM P. LEE,	<i>New York.</i>
J. GRENVILLE KANE,	<i>New York.</i>
DANIEL P. NEAD,	<i>Ohio.</i>
CLARKSON N. POTTER,	<i>New York.</i>
A. LEONARD,	<i>Missouri.</i>
H. G. DE FOREST,	<i>New York.</i>
JOHN LIVINGSTON,	<i>New York.</i>
JOHN P. USHER,	<i>Indiana.</i>
OSCAR STEPHENSON,	<i>Minnesota.</i>
GEORGE W. CAHOON,	<i>Vermont.</i>
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MANNING F. FORCE,	<i>Ohio.</i>
THOMAS EWING, JUN.,	<i>Kansas.</i>
JOSIAH MCROBERTS,	<i>Illinois.</i>
JOHN H. RANKIN,	<i>Missouri.</i>
ROBERT H. SMITH,	<i>Alabama.</i>
ROBERT A. HATCHER,	<i>Missouri.</i>
DANIEL W. VOORHEES,	<i>Indiana.</i>
JAMES W. DENVER,	<i>California.</i>
J. BUCHANAN HENRY,	<i>New York.</i>
THOMAS C. LYON,	<i>Tennessee.</i>
JOHN G. CABY,	<i>Ohio.</i>
SIDNEY S. HARRIS,	<i>New York.</i>
NEWTON D. STRONG,	<i>Missouri.</i>
WILLIAM W. MANN,	<i>New York.</i>
ABRAM B. OLIN,	<i>New York.</i>
ROBERT P. KANE,	<i>Pennsylvania.</i>
ISAAC S. SERBILL,	<i>Pennsylvania.</i>
ROBERT BRACKENRIDGE,	<i>Indiana.</i>
ALMON B. IVES,	<i>Illinois.</i>
ROBERT E. WILLIAMS,	<i>Illinois.</i>
ANDREW J. ISACKS,	<i>Kansas.</i>
JOHN W. DININNY,	<i>New York.</i>
HENRY M. MCGILL,	<i>District of Columbia.</i>
ALFRED ELY,	<i>New York.</i>
WILLIAM TRACY,	<i>New York.</i>
FREDERIC HALL,	<i>California.</i>
THOMAS H. DODGE,	<i>District of Columbia.</i>
ROBERT S. STEVENS,	<i>Kansas.</i>
SAMUEL T. WILLIAMS,	<i>District of Columbia.</i>



## LIST OF CASES REPORTED.

---

	PAGE
<b>Ableman v. Booth</b> . . . . .	506
<b>Allen et al. v. Newberry</b> . . . . .	244
<b>Anderson v. Montgomery</b> . . . . .	386
<b>Aspiuwall v. Knox County Commissioners</b> . . . . .	539
<b>Ballance v. Forayth</b> . . . . .	389
<b>Barber v. Barber</b> . . . . .	582
<b>Barber v. Barber</b> . . . . .	582
<b>Barnaby v. Brittan</b> . . . . .	529
<b>Barreda et al. v. Silsbee et al.</b> . . . . .	147
<b>Bassett v. United States</b> . . . . .	412
<b>Belcher v. Lawrason</b> . . . . .	252
<b>Booth v. Ableman</b> . . . . .	506
<b>Booth v. United States</b> . . . . .	506
<b>Boyreau v. Campbell</b> . . . . .	224
<b>Brittan v. Barnaby</b> . . . . .	529
<b>Brown v. Huger</b> . . . . .	305
<b>Campbell v. Boyreau</b> . . . . .	224
<b>Card v. Maguire</b> . . . . .	248
<b>Chamberlain, Claimant of the Propeller Ogdensburgh, v. Ward</b> . . . . .	572
<b>City Bank of Columbus v. United States</b> . . . . .	356
<b>Clearwater v. Meredith</b> . . . . .	489
<b>Clough v. Sturgis</b> . . . . .	451
<b>Combs v. Hodge</b> . . . . .	397
<b>Converse v. United States</b> . . . . .	463
<b>Cordes et al. v. Steamer (propeller) Niagara</b> . . . . .	7
<b>Covington Drawbridge Company v. Shepherd</b> . . . . .	112
<b>Dibble v. State of New York</b> . . . . .	366
<b>Dickins's Lessee v. Mahana</b> . . . . .	276
<b>Easton v. Salisbury</b> . . . . .	426
<b>Fenn v. Holme</b> . . . . .	181
<b>Fisher, Isaac, et al., v. Steamer Louisiana</b> . . . . .	1

	PAGE
Foley v. Porter . . . . .	393
Ford v. Williams . . . . .	287
Forsyth v. Ballance . . . . .	349
Forsyth v. Kelsey et al. . . . .	85
Fossatt v. United States . . . . .	445
French and Wife's Lessee v. Spencer . . . . .	228
Gamble v. Mason . . . . .	390
Hill v. Smith . . . . .	284
Hodge v. Combs . . . . .	397
Hoge v. Union Insurance Company . . . . .	85
Holme v. Fenn . . . . .	481
Huger v. Brown . . . . .	305
Humphreys v. Leggett et al. . . . .	66
Ihmsen v. Martin . . . . .	395
Insurance Company of Virginia v. Mordecai . . . . .	195
James Gray, Owners of, v. John Fraser, Owners of . . . . .	184
Jenckes et al. v. Livermore et al. . . . .	126
John Fraser, Owners of, v. James Gray, Owners of . . . . .	184
Kelsey et al. v. Forsyth . . . . .	85
Kendall et al. v. Winsor . . . . .	322
Knox County Commissioners v. Aspinwall . . . . .	539
Knox County Commissioners v. Wallace . . . . .	546
Law v. Rogers . . . . .	526
Lawrason v. Belcher . . . . .	252
Lawson et al. v. Thomas . . . . .	331
Lea v. Polk County Copper Company . . . . .	494
Leggett et al. v. Humphreys . . . . .	66
Livermore et al. v. Jenckes et al. . . . .	126
Lockett v. Pemberton . . . . .	257
Lownsdale v. Parrish . . . . .	290
McCarty et al. v. Roots et al. . . . .	432
McKinley et al. v. Morrish et al. . . . .	343
Madison and Indianapolis Railroad Company v. Pearce . . . . .	442
Maguire v. Card . . . . .	243
Mahana v. Dickins's Lessee . . . . .	276
Martin v. Ihmsen . . . . .	395
Mason v. Gamble . . . . .	390
Meredith v. Clearwater . . . . .	489
Milwaukee, City of, v. Richmond . . . . .	90
Milwaukee, City of, v. Richmond . . . . .	391

# LIST OF CASES REPORTED.

EXIII

	PAGE
Minnesota and Northwestern Railroad Company v. Rice . . . . .	82
Montgomery v. Anderson . . . . .	386
Mordecai v. Insurance Company of Virginia . . . . .	195
Morehouse v. Phelps . . . . .	294
Morrish et al. v. McKinley et al. . . . .	343
Newberry v. Allen . . . . .	244
New York and Erie Railroad Company v. Ross Winans . . . . .	88
New York, State of, v. Dibble . . . . .	366
New York and Liverpool U. S. Mail Steamship Company v. Rumball . . . . .	372
Nye v. United States . . . . .	408
Orton v. Smith . . . . .	241
Parrish v. Lowsdale . . . . .	290
Pearce v. Madison and Indianapolis Railroad Company . . . . .	442
Pemberton v. Lockett . . . . .	257
Penniman v. Western Telegraph Company . . . . .	460
Pennsylvania, State of, v. Ravenel . . . . .	103
Phelps v. Morehouse . . . . .	294
Philadelphia, Wilmington, and Baltimore Railroad Company v. Quigley . . . . .	202
Polk County Copper Company v. Lea . . . . .	494
Poorman et al. v. Woodward et al. . . . .	266
Porter v. Foley . . . . .	392
Quigley v. Philadelphia, Wilmington, and Baltimore Railroad Company . . . . .	202
Ravenel v. State of Pennsylvania . . . . .	103
Rice v. Minnesota and Northwestern Railroad Company . . . . .	82
Richmond v. City of Milwaukee . . . . .	80
Richmond v. City of Milwaukee . . . . .	391
Rogers v. Law . . . . .	526
Roots et al. v. McCarty et al. . . . .	432
Rumball v. New York and Liverpool Steamship Company . . . . .	372
Salisbury v. Easton . . . . .	426
Shepherd v. Covington Drawbridge Company . . . . .	112
Silsbee et al. v. Barrera et al. . . . .	147
Smith v. Hill . . . . .	284
Smith v. Orton . . . . .	241
Smith v. Walker . . . . .	579
Spencer v. French and Wife's Lessee . . . . .	228
Steamer Louisiana v. Isaac Fisher et al. . . . .	1
Steamer (propeller) Niagara v. Cordes et al. . . . .	7
Steamer (propeller) Ogdensburgh, Chamberlain, Claimant, v. Ward . . . . .	548
Sturgis v. Clough . . . . .	461
Sutter v. United States . . . . .	176

	PAGE
Telegraph, Magnetic, Company v. Western Telegraph Company . . . . .	456
Telegraph, Western, Company v. Magnetic Telegraph Company . . . . .	456
Telegraph, Western, Company v. Penniman . . . . .	460
Thomas v. Lawson et al. . . . .	331
Union Insurance Company v. Hoge . . . . .	35
United States v. Bassett . . . . .	412
United States v. Booth . . . . .	506
United States v. City Bank of Columbus . . . . .	356
United States v. Converse . . . . .	463
United States v. Nye . . . . .	408
United States v. Fossatt . . . . .	445
United States v. Sutter . . . . .	170
Vallette v. Whitewater Canal Company . . . . .	414
Vermont and Massachusetts Railroad Company v. White . . . . .	575
Walker v. Smith . . . . .	579
Wallace v. Knox County Commissioners . . . . .	546
Ward v. Chamberlain, Claimant of the Propeller Ogdensburgh . . . . .	572
Ward v. Steamer (propeller) Ogdensburgh, Chamberlain, Claimant . . . . .	548
White v. Vermont and Massachusetts Railroad Company . . . . .	575
Whitewater Canal Company v. Vallette . . . . .	414
Williams v. Ford . . . . .	287
Winans, Ross, v. New York and Erie Railroad Company . . . . .	88
Winsor v. Kendall . . . . .	322
Woodward et al. v. Poorman et al. . . . .	266

**THE DECISIONS**  
**OF THE**  
**SUPREME COURT OF THE UNITED STATES,**  
**AT**  
**DECEMBER TERM, 1858.**

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**THE CLAIMANTS AND OWNERS OF THE STEAMER LOUISIANA,  
APPELLANTS, v. ISAAC FISHER AND OTHERS, OWNERS OF THE  
SCHOONER GEORGE D. FISHER.**

Where a steamer approaches an object at night, and the captain is uncertain what it is, he should slacken his speed. If he does not take this precaution, his vessel will be responsible in case of a collision with another vessel.

The night was not so dark as to make it the duty of the schooner to show a light. The schooner was discerned by the steamer in sufficient time to have avoided the collision, if proper care had been exercised.

[MR. JUSTICE WAYNE DID NOT SIT IN THIS CAUSE.]

THIS was an appeal from the Circuit Court of the United States for the district of Maryland, sitting in admiralty.

The facts of the case are stated in the opinion of the court.

The District Court decreed that the libellants should recover the sum of three thousand dollars, they having claimed six thousand. From this decree both parties appealed, but upon its being affirmed in the Circuit Court as to both cross-appeals, the claimants of the steamer were the only party who brought the case up to this court.

It was argued by *Mr. Schley* for the appellants, and by *Mr. Wallis* and *Mr. Price* for the appellees.

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*Ex parte Louisiana v. Isaac Fisher et al.*

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The arguments in cases of collision chiefly rest upon an examination of the evidence, without involving any general principles of law. The following were the two points contended for by Mr. Schley:

1. That the omission of the schooner to display a light, under all the circumstances, was actual neglect, and a culpable fault. The following acts of Congress were cited in illustration:

1838, chap. 191, sec. 10, 5 Stat. at L., 306.

1849, chap. 105, sec. 5, 9 do., 382.

Also, the statute 14 and 15 Victoria, chap. 79, sec. 26.

The following cases were cited:

The Londonderry, 4 Supp. Notes of Cases, xlv, 5 Eng. Adm. Rep.

The Iron Duke, 2 W. Rob., 383, 9 Eng. Adm., 382.

Barque Delaware v. Steamer Osprey, 2 Wallace, jun., 268.

Rogers v. Steamer St. Charles, 19 How., 109.

Ure v. Coffman, 19 How., 63.

Ward v. Armstrong, 14 Illinois, 285.

Simpson v. Hand, 6 Whart., 324.

Carsley v. White, 21 Pick., 254.

The Aleival, 25 Law and Equity Rep., 604.

Williams v. Chapman, 4 Notes of Cases, 590, 592.

N. Y. and Va. Steamship Co. v. Calderwood, 19 How., 246.

7. Even if the schooner was not bound to display a light, *as an act of legal duty*, and even if the omission to do so was not, in fact, any want of care, yet it was no fault of the steamer, if the persons who were on the lookout on board of the steamer were physically unable, from the absence of a light, to discern the schooner, in due time to have made the necessary dispositions to avoid a collision. The rule should then apply, that in a case of misfortune, *without fault on either side*, the suffering party is without redress.

Peck v. Sanderson, 17 How., 178.

Stainback v. Rea, 14 How., 532.

Upon these points, the counsel for the appellees contended that, as matter of law, there was no obligation on the part of the schooner to carry a light or to display one on such a night;

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*Steamer Louisiana v. Isaac Fisher et al.*

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and, as matter of fact, the question of her having been without a light was not a practical one in this case. The evidence shows that the schooner could and should have been, and was, in fact, seen without a light, at such a distance as would have rendered a collision impossible, had ordinary care and skill been exercised on board of the Louisiana.

St. John v. Paine, 10 How., 586.

The Panther, 24 Eng. L. and Equity, 585, 587.

Walsh v. Rogers, 13 How., 283.

Newton v. Stebbins, 10 How., 606.

Ure v. Coffman, 19 How., 62, 63.

Morrison v. Nav. Co., 20 E. Law and Equity, 457, 458.

Moreover, the evidence shows that although those on board the steamer could not tell, when they first saw the schooner, whether she was under way or at anchor, they still recklessly kept up their great speed of fifteen miles an hour, and ran so close to her that, when they did actually discover her to be in motion, they could not, by stopping and backing, prevent the collision. The schooner, therefore, was in no default.

The Londonderry, 4 Notes of Cases Supplem., 37, 38.

Ward v. The Ogdensburgh, 5 McLean, 622.

Newton v. Stebbins, 10 How., 606.

The Perth, 3 Haggard, 417.

Steamer Oregon v. Rocca, 18 How., 572.

Rogers v. St. Charles, 19 How., 108.

Peck v. Sanderson, 17 How., 180, 182.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees instituted their suit in the District Court of the United States for the district of Maryland, sitting in admiralty, against the steamer Louisiana, in a cause of collision arising between the steamer and the schooner George D. Fisher, in the Chesapeake bay, in December, 1855, in which the latter was run into and sunk, and became a total loss.

The libellants charge, that before and at the time of the collision the schooner was bound on a voyage from Philadelphia to Norfolk, thence to the Chesapeake bay, and was properly manned and equipped for the voyage, and carefully navigated.

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*Steamer Louisiana v. Isaac Fisher et al.*

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That the steamer was seen from the schooner, shortly after ten o'clock P. M., about eight or ten miles distant, steering up the bay, the schooner making about four knots an hour, in a south-west course, against the wind, which was blowing about south by east. That when the steamer was within a half mile or a mile distant, she appeared to be hauling to the westward, with the apparent intention of crossing the schooner's bows, but shortly afterwards seemed to be again hauling to the eastward, as if to drop under the schooner's stern. That this last movement was made too late, the distance between the two vessels being too inconsiderable to allow it to be of any avail. That the moon was shining, and the schooner might have been seen at a considerable distance. That the course of the steamer was between north-northeast and northeast.

The claimants in their answer admit the fact of the collision, and the consequent loss of the schooner, and that it was a moon-light night, but say that it was cloudy in the western part of the horizon, and, in consequence of heavy banks of snow-clouds in that quarter, it was impossible to see vessels coming in that direction, without lights, at any considerable distance, and a steamer, therefore, coming up the bay, could not make such regulations as to speed and course as to avoid collisions, that would have been practicable and proper under other and more favorable circumstances. They allege that the schooner did not carry a light, and was the only vessel seen without one, and in consequence of this deficiency, and the character of the night, the schooner was not visible, and could not be seen until the two vessels were within the short distance of three or four hundred yards.

In reference to the fact of the collision, they answer, that when the schooner was first seen from the steamer, the schooner was to the eastward, and proper action was had on board the steamer to direct her course to the westward; but when the course of the schooner in that direction was ascertained, the course of the steamer was changed, and the boat was stopped and backed; but from the proximity of the vessels at this time, it was impossible by any effort to avoid the collision. The steamer was running at the rate of fifteen miles an hour before



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*Steamer Louisiana v. Isaac Fisher et al.*

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this time. The District Court pronounced a decree of condemnation, which was affirmed in the Circuit Court on appeal.

The evidence convinces the court that the schooner might have been distinctly seen from the steamer at a greater distance than a half mile.

It is shown that another vessel was sailing in the wake of the schooner, and was guided in her course by her, and that the schooner was distinctly visible to those who were on board that vessel at a greater distance.

It also satisfactorily appears that the schooner was in fact discovered by the lookout on board the steamer when the vessels were several hundred yards apart, and that, by careful management of the steamer, the collision might then have been avoided.

The captain of the Louisiana says: "That after passing the Rappahannock light-boat I saw a black object; it appeared to be heading about south-southwest down the bay; it was about two points or two points and a half to the east of us. I could not tell at that moment whether it was a vessel at anchor or under way, but directly discovered it was a vessel under way, and she kept right hard off to the westward. This vessel had no lights. I think the distance was from two hundred yards to two hundred and fifty. As soon as I saw her jib, I called to Mr. Marshall (pilot) to stop and back." Cross-examined, he says: "From the time I first saw the vessel until the time of the collision, was, I should suppose, two minutes, more or less. The vessel changed her course, and kept off hard to the westward. I saw her jib, which enabled me to judge that it was a vessel under way. The change took place immediately after I first saw the object. When I first saw it, it looked like a cloud. I could not tell if it was a vessel at anchor or under way. When I saw the jib, I first knew it was a vessel under way."

Notwithstanding the uncertainty in the mind of this officer, the vessel under his command continued on in her voyage with unabated speed. No order was given to arrest her progress till a collision with the schooner had become inevitable. This was a grave error, and it was followed by disastrous conse-

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*Steamer Louisiana v. Isaac Fisher et al.*

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quences, for which the owners must render indemnity. In the case of the *Birkenhead*, (8 W. Rob., 75,) the steamer was directed upon the supposition that a sailing vessel under way was at anchor, and proper precautions were taken under that hypothesis. The circumstances were such as might have occasioned a mistake. But the judge of the admiralty, with the advice of the Trinity masters, condemned the steamer to compensate for the collision, saying "that she should not have prosecuted her voyage in any uncertainty, but should have eased or reversed her engines until the fact was ascertained."

The case of the *James Watt* (2 W. Rob., 271) is similar in its circumstances to the one under consideration. The master testified, that when he discovered the sailing vessel, he ported his helm without stopping to ascertain her course. "In my apprehension," said the judge, "the master of the *James Watt* would have acted, under the circumstances, with greater prudence and caution, if, upon first discovering the sailing vessel, instead of porting his helm, he had continued his course at slack speed, by easing his engines till he was able to discover the course the sailing vessel was steering, and then acting according to circumstances. If he had pursued this course, it is apparent from the evidence, that, in the short space of about a minute after the sail was reported, he would have discovered her course, and could have adopted the measures that might altogether have prevented the collision."

The evidence shows that the *George D. Fisher* was making a southwest course, and was close hauled upon the wind. That she did not vary her course after the steamer came in sight. That the steamer was first directed to the westward, and afterwards to the eastward, and then stopped and backed, and that these contrary movements were the result of the doubts of her officers as to the position or course of the schooner. If the order to ease the engines, or to stop, had been given in the first instance, the probability is that the catastrophe would have been avoided.

The decisions of this court have settled that this was the duty of the steamer under such circumstances. (*Peck v. Sanders*, 17 How., 178.) It is contended on the part of the

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*Propeller Niagara v. Cordes et al.*

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appellees that the schooner is responsible for failing to carry a light. In the case of the *Osmanli*, (7 Notes of Cases, 507,) the learned judge of the admiralty says: "That no question has been more mooted and left more unsettled than this—whether it is the duty of a sailing vessel at night to show a light? Beyond all doubt, it has been determined there is no such general obligation; at the same time, there have been occasions on which, for the sake of avoiding a misfortune, which was in all human probability likely to occur, it became the duty of a vessel to show a light." In the present case, we have not been able to discover any fact that imposed the obligation upon the schooner to do so. The night was moonlight; and though the light was occasionally obscured, the evidence does not show that it was so, to a degree that rendered the navigation of the bay at all dangerous, if care, skill, and vigilance, had been employed upon the different vessels.

The court is of opinion that the schooner was discerned from the steamer in sufficient time, and that the latter might have avoided the collision by the exercise of proper care.

Decree affirmed.

Mr. Justice DANIEL dissented, for want of constitutional power in courts of the United States in admiralty.

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THE PROPELLER NIAGARA, HER ENGINE, &C., ANSEL R. COBB  
AND OTHERS, CLAIMANTS AND APPELLANTS, v. JOSEPH H.  
CORDES.

THE PROPELLER NIAGARA, HER ENGINE, &C., ANSEL R. COBB  
AND OTHERS, CLAIMANTS AND APPELLANTS, v. LESTER SEX-  
TON AND OTHERS.

Where a general ship, employed in navigating the lakes, receives goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, her liability must be determined by the rules of law applicable to carriers of goods upon such inland waters.

A common carrier by water, as on land, is responsible for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy.

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*Propeller Niagara v. Cordes et al.*

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or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

Amongst the duties imposed upon carriers by water, one is to see that the vessel is provided with a competent and skillful master.

The act of Congress, passed on the 3d of March, 1851, (9 Stat. at L., 635,) limiting the liability of ship owners, does not apply to the present case.

After a vessel is stranded, there is still an obligation upon the master to take all possible care of the cargo. His duties in that respect are not varied by that event, and proof merely of reasonable care and diligence will not excuse him from liability.

Where a vessel put into Presque Isle at night, in a storm, upon Lake Huron, the evidence does not justify this court in adjudging that the master could have kept on his course, nor in holding the vessel responsible for an error in judgment in the master, in the measures which he adopted after he had succeeded in entering the harbor.

But after the vessel was stranded, he was guilty of culpable negligence in not protecting the cargo with sufficient care, and in returning home and allowing the cargo to remain in the vessel during the remaining part of the winter, and until a late day in the spring.

A master must not abandon his ship and cargo upon any grounds, so far as the goods are concerned, when it is practicable for human exertion, skill, and prudence, to save them from the impending peril.

THESE two cases were appeals in admiralty from the District Court of the United States for the district of Wisconsin.

Both cases were founded upon the same facts, which are fully stated in the opinion of the court.

In the first case, that of Cordes, the District Court decreed that the libellant should recover \$3,763.76, with costs; and in the other case, that Sexton should recover \$4,964.50, with costs. The owners of the propeller appealed to this court in both cases.

They were argued by *Mr. Haven* for the appellants, and by *Mr. Russell* for the appellees.

The evidence cannot be reported upon the questions of fact, such as—

1. Whether the vessel was staunch, well manned, provided, and furnished.
2. Whether she was carefully and properly stowed.
3. Whether she was too heavily loaded.

*Propeller Niagara v. Cordes et al.*

4. Whether there was a want of care or lack of judgment in going into Presque Isle.

5. Whether the propeller was stranded by mere force of winds and waves and dangers of navigation.

6. Whether the goods were wetted by the leak so produced.

After discussing these questions of fact, as they appeared from the evidence, the counsel for the appellants made the following point of law, viz:

Here, the appellants claim, the extraordinary liability of the respondents as carriers ended, and a new rule of responsibility commenced. Their responsibility, after this period, was for damages arising from want of diligence and proper exertion towards saving and delivering the goods on board, and the proper standard of diligence henceforward was "*such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property similarly situated.*" This rule is quoted from *Smyrle v. Niolen*, 2 Bailey S. Carolina Rep., 421, cited in *Angell on Carriers*, sec. 187, p. 187.

Again. In cases of necessity or calamity during the voyage, the master is by law created an agent from necessity, for the benefit of all concerned; and what he fairly and reasonably does, under such circumstances, in the exercise of a sound discretion, binds all parties in interest in the voyage, whether owners, or shippers, or underwriters.

See *Smith's Mercantile Law*, 292, note and cases cited. *Abbott on Shipping*, 453, at bottom, *et seq.*, *Story & Perkins's* edition.

1 *Story C. C. Rep.*, 842, 853.

2 *Kent Com.*, 212.

5 *Johnson's Rep.*, 262.

*Searls & Adams v. Scoville*, 4 *Johnson's C. Rep.*, 218.

3 *Robinson*, 240.

1 *Salkeld*, case 34.

*Miston v. Lord*, 1 *Blatchford's Rep.*, 354.

A request and authority are necessarily implied, when the master exercises his discretion and judgment fairly.

*Douglass v. Moody*, 9 *Mass. Rep.*, 550.

7. With navigation closed, no ability to tranship, and noth-

*Propeller Niagara v. Cordes et al.*

ing that could be done but keeping the goods at Presque Isle, what was the duty of the respondents?

The answer is found in the case in 2 Bailey, 421, above cited.

Angell on Carriers, sec. 187.

Bowman v. Teal, 23 Wendell's Rep., 806.

Story on Bailment, secs. 509, 512.

1 Gray's Rep., 263, and cases there cited.

8. By the discretion of Captain Mallon, Jones, his mate, Captain Gibson, and Fargo, the goods were left on board, as the best that could be done for them.

See authorities on last point.

9. The master could have done nothing else—no storage on shore—could not get goods on shore—mode of stowage—crates—casks—dunnage below—well stored and full of above—ventilation, &c.

10. The propeller was got off at the earliest possible time in spring, repaired, and the goods delivered to the consignees.

11. The principle on which the extraordinary responsibility of common carriers is founded does not require that that responsibility should extend to the time occupied in transportation. That principle is the danger of robbery and embezzlement by collusion or fraud on the part of the carrier.

Parsons v. Hardy & McCormick, 14 Wend., 215.

The principle does not extend beyond the ultimate delivery of the goods; it does not extend to the condition in which they are delivered, provided they are all delivered.

The carrier may excuse *delay of delivery*, by accident or misfortune, is decided in the case last cited; and why not excuse *injury* by the same means, if by the ultimate delivery they show there has been no robbery or embezzlement by collusion or fraud?

Bowman v. Teal, 23 Wend., 806, 810.

See Forward v. Pittard, 1 Term Rep., 27, as giving reasons on this point.

Story on Bailment, secs. 490, 509, 512.

McHenry v. Phila., Wil., and Balt. R. R. Co., 4 Harrington, 448.

12. When the goods are *actually delivered* at the place of des-

*Propeller Niagara v. Cordes et al.*

tion, and the complaint is only of a *late delivery*, the question is simply one of *reasonable diligence*, and accident or misfortune will excuse the carriers, unless they have expressly contracted to deliver the goods within a limited time.

Wibert v. N. Y. and Erie R. R. Co., 2 Kernan, 245—250, citing Harmony v. Brigham, same book, p. 99.

Parsons v. Hardy, 14 Wend., 215.

Angell on Carriers, sec. 213, and particularly note 2.

Same book, secs. 289, 328.

The argument and references made by the counsel for the appellees, upon the questions of fact above stated, are omitted. The argument upon the point of law respecting the liability of the master, after the vessel was stranded, was as follows:

The master was guilty of want of ordinary care of the interest of the shippers, in deserting the vessel after she was stranded; in making no efforts to remove the libellants' goods from their place of stowage, either ashore, or to some part of the vessel where they would have escaped damage by water.

1. The law is well settled, that it is the duty of the master to adopt every reasonable and practicable method to take care of the goods during such interruptions, by unlading and storing, to prevent wetting, and drying if already wet, so that his contract to deliver in good order may be fulfilled; and a peril of the sea, imposing such duty upon him, will not be regarded as the proximate cause of alleged damage, if he was delinquent in this regard.

Chouteaux v. Leach, 18 Pa. S. R., 224, 6 Harr., 224.

Bowman v. Teal, 23 Wend., 306.

Shepherd v. King, 3 Story, 349.

The Barque Gentleman, Olcott, 118.

Bird v. Cromwell, 1 Miss., 38.

Harrington v. Niles, 2 Nott and McCord, 88.

Fland. Mar. Law, 155.

S. B. Co. v. Beeson, Harper, 262

Marvin's Law of Wreck and Salvage, 21.

a. There is no variation in the duty or liability of the master and owners after stranding.

Abb. Shipp., 454 n. (1.)

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*Propeller Niagara v. Cordes et al.*


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King v. Shepherd, 3 Story, 349.

Marvin's Law of Wreck and Salvage, 21.

b. The rule is analogous to that which, in France and America, *compels* a master to preserve and tranship in case of disabling.

Shipton v. Thornton, 9 Ad. and E., 314.

Tronson v. Dent, 36 Eng. L. and Eq., 41.

Hugg v. Ins. Co., 7 How., 604.

Saltus v. Ins. Co., 12 Johns., 107.

Bryant v. Ins. Co., 6 Pick., 131; 1 Arnould, 187.

By the English law, it is in the *discretion* of the master. This exhibits the *leaning* of our law to hold the master strictly.

c. Also to the rule in cases of salvage claimed by seamen, (Hobart v. Drohan, 10 Pet., 127,) and cases of capture, (Cheviot v. Brooks, 1 Johns., 367.)

2. No effort *whatever* was made to rescue the libellants' goods from what was not only apparent and probable, but almost certain, damage and destruction. And it does not lie in the mouth of the appellants to say that, by possibility, the damage might have happened even if they had resorted to any or all expedients of prevention; in such cases of careless and cowardly abandonment, the law will *presume* that well-directed efforts would have been successful.

Garrett v. Davis, 6 Bing., 716.

19 Eng. C. L., 714.

Williams v. Grant, 1 Conn., 492.

Fland. Shipp., 303, 261, 269, 199, n. (1.)

a. After the vessel began to make water, the pumps were used for an hour or two, until they were choked with sand; the wooden hand-pumps were in good order, but not used; the master was informed of the pumps of the Albany, near by, but made no effort to procure them. It was apparent, at first, that the water could have been lowered, so as to remove the goods from the hold. The ice was about to form, evidently, strong enough to admit of removal of goods over it. After the ice went away, a bridge could have been built, or the scow could have been used which was in the vicinity. It is clear the master felt satisfied on the question of *removal*, or else he



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*Propeller Niagara v. Cordes et al.*

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would not have looked for places to store the property on shore.

If the master and mates had remained, it is evident they might have taken out the perishable articles, fish, fruits, &c., and thus have prevented them from being essentially damaged themselves, or at least from damaging the dry goods of Sexton. If a *part* had been removed, the remainder could have been secured on the vessel.

To say the very least, there is good reason to believe that the houses on shore, and the means of erecting more, might have been used to afford safe storage on shore.

*b.* It is no reply to say that the master took advice of other masters. It does not appear that they gave such advice with any personal knowledge of the depth of the water, the mode of stowage, the character of the goods, or any of the necessary *data*. Gibson made no examination; the master and mate do not agree as to the depth of the water; and the opinions of advisers were doubtless based upon a false or imperfect statement of facts.

However, the advice of the best-informed men would make no difference. It must be clear *to the court* that the master's conduct was proper.

Tronson *v.* Dent, *ubi supra*.

Lawrence *v.* Minturn, *ubi supra*.

Marvin's Law of Wreck and Salvage, 20, 21.

*c.* The hatches were kept closed, although the liability of a part of the cargo to decay was known, until the stench, in March, compelled the keepers to open them; and all the dampness and filth of the hold was permitted to come in contact with the dry goods of Sexton.

*d.* The master left on the third day, leaving no subordinate officer with instructions, but taking those officers with him, and giving no orders to the keepers whatever.

*e.* Is not this question decisive: "Would the master have acted as he did, if the goods had been his own?" There can be but one answer; nor is there any doubt as to his duty, as the agent of shippers, owners, and insurers, to take at least such care as he would of his own goods.

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*Propeller Niagara v. Cordes et al.*

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Mr. Justice CLIFFORD delivered the opinion of the court. These are appeals in admiralty from the District Court of the United States for the district of Wisconsin.

Libels were filed in these cases at a special term of the District Court of the United States, begun and held at the city of Milwaukee, on the first Monday of November, 1855. They are drawn in the usual form of libels *in rem*, and respectively allege a breach of contract of affreightment. Both suits grew out of contracts for the transportation of goods by the steam propeller Niagara, on her last trip during the season of 1854, from the port of Buffalo, in the State of New York, to Chicago, in the State of Illinois. They were argued together in this court, and it was conceded at the argument, by the counsel on both sides, that they depended substantially upon the same state of facts. All the testimony respecting the liability of the steamer was first taken and filed in the case last named, and was subsequently admitted and read in evidence at the hearing in the other suit, under a stipulation of the parties, and the pleadings are substantially the same in both cases. On the part of the libellants, it is alleged, among other things, to the effect that on or about the twenty-eighth day of November, 1854, the libellants caused certain goods, particularly described in the respective libels, to be shipped in good order and condition on board the propeller Niagara, to be transported from Buffalo to Milwaukee, in the State of Wisconsin, and that the master, Hugh Mallon, received the goods on board, and in consideration of certain freight, to be paid in that behalf by the respective libellants, undertook and promised to convey the goods from the port of shipment to the port of destination, and there to deliver the goods, (the dangers of navigation, fire, and collision, only excepted,) in like good order and condition to the libellants or their respective agents.

And they further allege that the steamer shortly thereafter departed on her voyage, but that the master, not regarding his duty, nor his promise and undertaking, did not so convey the goods, although no danger of navigation, fire, or collision, prevented him from so doing, and that the goods, or a large portion of them, through the mere carelessness, negligence, and

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*Propeller Niagara v. Cordes et al.*

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improper conduct, of the master, his mariners, or servants, became wetted, heated, or stained, and greatly damaged, or wholly lost to the libellants. Answers in the usual form of pleading were duly filed in each case on the twenty-fourth day of May, 1855, admitting the jurisdiction of the court, and setting up substantially the same grounds of defence. They are alike in all their material allegations, so far, at least, as respects the questions discussed at the bar, and all the matters involved in the judgment of the court. In both cases the answers admit the contract to transport the goods, as per bill of lading, the dangers of navigation, fire, and collision, excepted, and that certain packages, under each of the contracts, were accordingly shipped on board the steamer for that trip, leaving it to the libellants in each case to make such proof of the kind, quantity, and value of the goods, as they might be advised was material, and aver that the steamer, when she departed on the voyage, on the twenty-ninth day of November, 1854, was tight, staunch, seaworthy, and well manned, and that her entire cargo was well, safely, and securely stowed. And the respondents, denying every allegation in the libels, of carelessness, negligence, and improper conduct, on the part of the master and his mariners, aver the fact to be that they were vigilant, competent, and skilful in the premises, and did what it was their duty to do under the circumstances in which they were placed. They admit, also, that a part of the cargo was damaged, but allege and insist that the damage was occasioned by a danger of navigation within the exception of the bill of lading, for which they are not, and ought not, in any manner to be held responsible. And they further allege that the steamer was, by stress of weather, compelled to make the harbor of Presque Isle, and by the snow and the force of the storm and wind, which was very severe, the steamer dragged her anchor, went ashore, and was dashed upon the beach, from which cause, and the necessary detention of the goods on board, the damage, whatever it is, occurred; and that in the month of May, 1855, which was as soon thereafter as it was possible to repair the steamer and for her to proceed on her voyage, the goods, or so much of them as belonged to the respective libellants, were

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*Propeller Niagara v. Cordes et al.*

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transported to Milwaukie, and there delivered to them, and were by them respectively received, with a full knowledge of the damage, if any, and of its cause, and with an agreement not only to share the damage, but that the goods should be charged with and pay their proportion of a general average of the losses thus occasioned; and the respondents claim that the libellants, in each case, are liable "for a large amount of the average and damage" to the steamer, which they aver to be the sum of two thousand dollars.

This statement from the libels and answers embraces the substance of the pleadings in both cases, so far as respects the several matters discussed at the bar, and the real merits of the controversy. Testimony was taken on both sides in the court below, and after a full hearing a decree in each case was entered for the libellants, and the respondents appealed to this court. No additional testimony has been taken since the appeal, and it seems to be conceded that the rights of the parties depend chiefly upon certain questions of fact to be determined from the evidence, which is conflicting, and in some particulars very contradictory. That remark, however, applies more particularly to that part of the testimony which relates to the conduct of the master after the steamer was stranded, and the means at his command to secure and preserve the goods from damage. Many of the facts and circumstances connected with the voyage, as well as those attending the disaster, are involved in much less difficulty, and some of those most material to be ascertained are satisfactorily proved, without any contradiction whatever. On the one side, no question is made that the goods were regularly shipped at Buffalo on the twenty-eighth day of November, 1854; and on the other, it is admitted that in the contract of shipment the dangers of navigation, fire, and collision, were duly excepted in the usual form of such an exception in bills of lading. All of the goods were shipped in good order and condition, and were to be delivered at Milwaukie, as alleged by the libellants. They consisted in the one case of groceries, and in the other of dry goods; and it is conceded that they were carefully and properly stowed. On the day following the shipment, the Niagara

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*Propeller Niagara v. Cordes et al.*

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left Buffalo, and proceeded on her intended voyage. She was a steam propeller, of four hundred and fifty tons burden, and at the time of her departure was a good, tight, stanch vessel, every way suitable for the navigation in which she was engaged, and was well furnished with ground tackle, including two anchors and two chains. One of her anchors weighed fourteen hundred pounds, with an inch and an eighth chain of sixty fathoms, and the other weighed seven hundred pounds, with a chain of the usual size and length. Her whole company consisted of twenty-two men, constituting a full complement of officers and crew for the voyage in a steamer of that description. Having proceeded on the usual route for that voyage, she arrived in Lake Huron on the second day of December, at four o'clock in the morning, in perfect safety, and crossed Saginaw bay in the afternoon of the same day. About eight o'clock in the evening of that day, it commenced snowing, with a light wind, which by twelve o'clock at night freshened to a gale, and the storm continued without any abatement, blowing a heavy gale from a northeasterly direction, or east-northeast, till the day after the steamer was stranded.

After crossing Saginaw bay, however, she continued on her regular course, and made Thunder-bay light at one o'clock, and proceeding onward on her voyage, arrived off Presque Isle, and made the light at that place at four o'clock in the morning, without having suffered any damage or met with any difficulty except that the master testifies that she rolled heavily, and that for a half or three-quarters of an hour before he made the light, he had to keep her off her course two points, to ease her in the sea. Her course from Thunder bay had been north-northwest for a short time, then west by north, and then north-west; and the mate of the steamer testifies, that when they first saw Presque Isle light, the steamer was a mile or two east of the light, and was in the usual course. At that time she was in no want either of wood or water, and it does not appear that she was in any worse condition to proceed on the voyage, unless prevented by the storm, than at the moment when she left the place of her departure. Her cargo was a general assortment of merchandise, consisting of teas, sugars, coffee, fish,

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*Propeller Niagara v. Cordes et al.*

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liquors, molasses, crates of crockery, bales of sheeting, boxes of dry goods, and various other articles, specified in the record. All of the liquors, molasses, and some of the boxes, were stowed on the ground-tier in the lower hold. Heavy goods were placed at the bottom, and light goods on top, and the hold was full, and battened down. Most of the light goods, such as boxes of merchandise, teas, sugar in barrels, and bales of sheeting, were on deck, and there were some willow wagons on the hurricane deck. None of her deck load had been washed away or injured, and it does not appear that it had been in any manner displaced or thrown into disorder by the rolling of the vessel.

These considerations tend strongly to show that there could not have been any urgent necessity to change the course of the steamer on account of the violence of the storm or the motion of the vessel, and, consequently, affect the credit of the master, and corroborate the statement of the mate, that, at the time the light was discovered, the steamer was pursuing her usual route. Both the master and the mate were on deck when they made the light, and the master gave the order to run into Presque Isle. In entering the harbor, they steered west-southwest, and then doubled inside of a small shoal round to the southeast, in order to get to the pier. What purpose was to be accomplished by getting to the pier, it is not easy to perceive, as the mate testifies that they knew that the sea was so heavy that the steamer could not lie at the dock. They, however, came round to the southeast, and so near to the pier that the mate says he could see the snow on the beach, and then let go the large anchor, and the wind immediately caught the steamer on the larboard bow, and she commenced dragging the anchor. When they found that the steamer dragged, and that there was danger that she would go ashore, instead of casting the other anchor, their first endeavor was to get rid of the one already cast, in order, if possible, to work her off, and make another effort to get up to the dock; and, finding that they could not heave the chain with the windlass, their next effort was to slip it; and while they were endeavoring to unshackle the chain the steamer struck, and went on to the beach stern first, and

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*Propeller Niagara v. Cordes et al.*

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immediately swung round broadside to the shore. No attempt was made to let go the small anchor, although it was hanging at the bow, and the mate admits that the steamer dragged more than a quarter of a mile before she struck. They presently tried the pumps, and it was found that she did not leak. Shortly after, she commenced pounding, and it was then ascertained that she was making water freely, when they started the engine-pump, but it choked with sand, and they were obliged to desist. At the place where the steamer lay the water was seven or eight feet deep, and she filled to the level of the water outside in two or three hours, so that the water in the hold was four or five feet deep above the top of the keelson. It was about five o'clock in the morning of the third of December, 1854, that the steamer went on to the beach, and the master and all hands remained on board till ten o'clock in the forenoon, when he and the mate went on shore for the purpose, as he testifies, of ascertaining whether there were any facilities for storing the goods, and whether it would be possible to unload the steamer, and get her off. When he got on shore, he found the steamer Plymouth, bound down the lake, lying there, fastened at the dock, she having touched at Presque Isle for wood four or five hours before the arrival of the Niagara, and remaining there on account of the storm. Having made certain inquiries of the residents, and consulted with the master of the Plymouth, he came to the conclusion that it was the safest way to leave the goods on board, as more of them, in his judgment, would be protected in that mode than by removing them on shore; and on the morning of the sixth of December, the master, other officers, and all the crew of the Niagara, except three, took passage in the Plymouth, leaving the watchman, wheelsman, and porter, in charge of the steamer, with the hatches fastened down, and the goods in the condition in which they were when the steamer was stranded. During the night of the fourth of December, the storm subsided; but the following day was very cold, so that the steamers were frozen in, and persons walked on the ice from the pier to the place where the Niagara lay, which was more than a half mile. It moderated, however, during the night, and on

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*Propeller Niagara v. Cordes et al.*

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the following morning the ice went out of the harbor, and two other steamers, the Republic and Kentucky, came in before the Plymouth left, and the former took the place of the Plymouth at the dock after she started on her voyage down the lake. Several witnesses testify—and among the number the master of the Plymouth—that the sixth of December, the day he left, was a fine day, although, he says, there was so much ice about his boat, where she lay at the dock, that he had to cut her out in the morning before he started.

One of the witnesses for the libellants, who resides at Presque Isle, testifies, that after the Plymouth left, it was clear, and made ice, but did not blow, and that not long after there was a thaw, which continued till the thirteenth of January, and that after the thaw there were two or three weeks of very nice weather. Navigation, however, closed in a few days after the Plymouth left, and the Niagara remained on the beach, where she was stranded, until the mate, who is now the master of the Niagara, returned to Presque Isle, on the twenty-seventh day of April, 1855. When he returned, he found her where he left her, in charge of the watchman. He immediately pumped her out with a steam-pump, according to his account, and lightened her off with a steamboat, and, after she was lightened, got the steamboat to take her up to the dock, where he removed the residue of the goods, and then took her to Detroit and had her repaired. After she was repaired, he returned to Presque Isle, in the month of May, 1855, and conveyed the goods, or so much of them as had not been destroyed, to the place of destination. Some of the goods were in good condition or were slightly injured, while others were greatly damaged or wholly worthless. Those stowed below had remained entirely without ventilation from December to March, and then the hatch at midships only had been opened. They were heated, discolored, and stained, and one of the witnesses testifies that sugar, coffee, and dried fruit, were all soaked together, and that the water pumped up was dark, exhibiting the appearance of the soakings of coffee and codfish, and that the goods had the offensive smell of dead water. They were taken out about the first of May, so that those stowed in the



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*Propeller Niagara v. Cordes et al.*

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lower hold, not more than four or five feet above the keelson, had been submerged in bilge-water for nearly five months, and some of those above the water had been moistened by the dampness and become mouldy. Damages to the amount of three thousand seven hundred and sixty-three dollars and seventy-six cents were allowed by the district judge, in the case first named, and in the other, four thousand nine hundred and sixty-four dollars and thirty cents, and it is not pretended in the argument that the respective amounts were either extravagant or unreasonable. It is not upon any such ground that the appellants seek to reverse the respective decrees in the court below. They deny that they are liable at all for any amount, and set up the first exception in the contract of shipment or bill of lading, and their counsel insist upon the following propositions:

I. That the damage to the goods resulting from the stranding of the steamer was wholly occasioned by the dangers of navigation, the risk of which was not taken by the master or owners of the steamer.

II. That after the Niagara was stranded and filled with water, and disabled from proceeding on her voyage, the appellants were responsible only for the ultimate delivery of the goods, and for reasonable care in preserving them from the effect of storms, bad air, leakage, and embezzlement.

III. That the master, after the steamer was stranded, and the goods wetted, became and was the agent of the shippers of the goods as well as of the owners of the vessel, and as such, under the circumstances of this case, is responsible only for due and proper care and diligence, and that it cannot be successfully contended, from the evidence, that such care and diligence were not exercised.

These propositions, whether taken separately or collectively, necessarily involve mixed questions of law and fact, which in a case like the present must be determined by the court, acting instead of a jury, to find the facts, and as a court to determine the law. Such propositions, therefore, must be considered in connection with all the legal evidence exhibited in the record, and their accuracy must be tested by the true state of

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*Propeller Niagara v. Cordes et al.*

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the facts as found by the court from the evidence, and by the rules of law applicable to that state of the case. According to the admitted or undisputed facts of the case, the Niagara was enrolled and licensed for the coasting trade, and was employed by the owners in transporting goods, under contracts for freight, upon navigable waters between ports and places in different States, and at the time of the disaster she had a full cargo of merchandise, of various descriptions, on board, consigned to merchants or parties residing either at her port of destination or at Milwaukie, and other intermediate ports or places along the course of her voyage. She was a general ship, laden with goods to be transported for hire; and the goods in question having been received and taken charge of, as goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, the question of liability in this case must be determined by the rules of law applicable to carriers of goods upon such inland waters. A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. In all cases where there is no special agreement to the contrary, he is entitled to demand the price of carriage before he receives the goods; and if not paid, he may refuse to receive them; but if he take charge of them for transportation, the non-payment of the price of carriage in advance will not discharge, affect, or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed. When he receives the goods, it is his duty to take all possible care of them in their passage, make due transport and safe and right delivery of them at the time agreed upon; or, in the absence of any stipulation in that behalf, within a reasonable time. Common carriers are usually described as of two kinds, namely, carriers by land and carriers by water. At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods intrusted to his care safely, and is liable for all

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*Propeller Niagara v. Cordes et al.*

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losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods.

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skilful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence. He must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage; unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable, as well as the master and owners. A clean bill of lading, in general, imports, unless the contrary appear on its face, that the goods are to be safely and properly secured under deck. (Fland. on Ship., sec. 192.)

In the case of a parcel shipment, the master is allowed to show a local custom to carry the goods on deck in a particular trade.

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*Propeller Niagara v. Cordes et al.*

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It must, however, be a custom so generally known and recognised, that a fair presumption arises that the parties in entering into the contract agreed that their rights and duties should be regulated by it. Having received the goods for transportation, in the absence of any stipulation as to the period of sailing, the master must commence the voyage within a reasonable time, without delay, and as soon as the wind, weather, and tide, will permit. After having set sail, he must proceed on the voyage, in the direct, shortest, and usual route, to the port of delivery, without unnecessary deviation, unless there has been an express contract as to the course to be pursued; and where the vessel is destined for several ports and places, the master should proceed to them in the order in which they are usually visited, or that designed by the contract, or, in certain cases, by the advertisement relating to the particular voyage. A deviation from the direct route may be excusable if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates, or for the purpose of obtaining necessary supplies of water and provisions, or, in the case of a steamer, to obtain necessary supplies of wood or coal for the prosecution of the voyage, or for the purpose of assisting another vessel in distress.

As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by some cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, it becomes his duty under such circumstances to procure it and transport the goods to their place of destination, and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured. That rule, however,

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*Propeller Niagara v. Cordes et al.*

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is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time. In that state of the case he may, if he deems it best, retain the goods until the repairs are made, and forward them in his own vessel; and upon the same principle, and for the same end, if he have no means to tranship the goods, it is his duty to repair his own vessel, when capable of being repaired, provided it can be done within a reasonable time, and he has the means at his command; and if not, and the means cannot be obtained from the owner, or upon the security of the ship, he may sell a part, or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be enabled to resume the voyage and carry the goods, or the residue, as the case may be, to the place of destination; and he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a reasonable time, and carries them on to the place of delivery. Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and they cannot be modified or relaxed except by the interposition of the legislative power of the Constitution. Time and experience have shown their value and demonstrated their utility and justice, and they ought not and cannot be changed by the judiciary. Some new and important provisions have been introduced into the law of carriers by water, by the act of the third of March, 1851, entitled "An act to limit the liability of ship-owners." Owners of ships under that act are not held liable for loss or damage to the cargo by reason of fire happening to or on board the vessel, unless the fire was caused by the design or neglect of such owner, except in cases where there is a special contract between the owner and the shipper, whereby the former assumes that risk. They are declared not liable as carriers for precious metals, precious stones, or jewels, or for the bills of any bank or public body, unless at the time of their lading a note in writing of their true character and value be given to the owner or his agent, and the same be entered on the bill of lading; and in no case where that act applies will the owner be liable for the articles therein enumerated beyond the amount

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*Propeller Niagara v. Cordes et al.*

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so notified and entered. It contains other provisions also of very great practical importance, and among the number the following: That for embezzlement, loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of the owner, his liability shall in no case exceed the amount or value of his interest in the vessel and the freight then pending. No part of the act, however, applies to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.

A question may arise, whether the lakes bordering on a foreign jurisdiction are or are not excluded from the operation of the act under the term inland navigation; but it is not necessary at the present time to determine or consider that question, as the first exception in the contract of shipment is the only one set up in this case, and there is no pretence that there has been any transfer of the steamer under the fourth section of the act for the benefit of the libellants.

Carriers by water are liable at common law, and independently of any statutory provision, for losses arising from the acts or negligence of others, to the same extent and upon the same principles as carriers by land—that is to say, they are in the nature of insurers, and are liable, as before remarked, in all events, and for any loss, however sustained, unless it happen from the act of God, or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading. Duties remain to be performed by the owner, or the master as the agent of the owner, after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those, too, of a very important character, arising immediately out of his original undertaking to carry the goods safely to their place of destination. His obligation to take all possible care of the goods still continues, and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck, and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the seacoast in certain seasons

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*Propeller Niagara v. Cordes et al.*

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of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied, or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill, and prudence. An effort was made by able counsel, in *King v. Shepherd*, (3 Story C. C., 358,) to maintain the proposition, assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine, and held that his obligations, liabilities, and duties, as a common carrier, still continued, and that he was bound to show that no human diligence, skill, or care, could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking, and the meaning of the contract, as universally understood in courts of justice. Admit the proposition, and it is no longer true that, where there is no provision in the contract of affreightment varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods intrusted to his care, except by proving that it was the result of some natural and inevitable necessity superior to all human agency, or of a force exerted by a public enemy. Kent, Chief Justice, said, in *Elliott v. Russell*, (10 Johns., 7,) decided in 1813, that it has long been settled that a common carrier warrants the delivery of the goods in all but the excepted cases of the act of God and public enemies, and there is no distinction between a carrier by land and a carrier by water; and the same learned judge also held that the character, duty, and responsibility of a carrier continues to attach to a master as long as he has charge of the goods. A master,

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*Propeller Niagara v. Cordes et al.*

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says a learned commentator, should always bear in mind that it is his duty to convey the cargo to its place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty is an act for which both he and his owners may be made responsible. His duties as carrier are not ended until the goods are delivered at their place of destination, or are returned to the possession of the shipper, or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law. (*King v. Shepherd*, 3 Story C. C., 349; *Abbot on Ship.*, 8th ed. Perk., 478.) These authorities are sufficient, it is believed, to demonstrate the proposition, that where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in this case. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel; and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged. All the evidence, however, in this case, shows the fact to be otherwise; that the goods did not perish at the time the steamer was stranded; and the damage having since occurred, the rule of law to be ascertained is the one applicable in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do under like circumstances. In great dangers great care is the ordinary care of prudent men, and in great emergencies prudent men employ their best exertions; so that the difference in the rule contended for, and the one here laid down, is much less than at first appears. Nevertheless there is a difference, and in a question of so much



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*Propeller Niagara v. Cordes et al.*

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practical importance it is necessary to adhere strictly to the correct rule. Losses arising from the dangers of navigation within the meaning of the exception set up in this case are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertions, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law results from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences, the excepted peril may be regarded as continuing its operation. Such, it is believed, is the nature of the contract between a carrier and shipper, so far as it becomes necessary to examine it in the cases under consideration. Carriers may be answerable for the goods, although no actual blame is imputed to them; and after the damage is established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they are exempted in the contract of shipment or bill of lading. (Clark v. Barnwell, 12 How., 272; Rich v. Lambert, 12 How., 347; Chitt. on Carriers, 242; Story on Bail, secs. 528, 529; 3 Kent Com., 213; 1 Smith Lead. Cases, 313; Choteaux v. Leech et al., 18 Penn., 238; Fland. on Ship., sec. 257; Marvin on Wr. and Salv., 21; Parsons's Mer. L., 348; Smith's Mer. L., 3d ed., 386.)

Applying these principles of law in the consideration of the case, we will proceed to a brief review of the evidence, in connection with that already given, bearing upon the questions of fact presented for decision. It has already appeared that the steamer made the light at Presque Isle on the third day of December, 1854, at four o'clock in the morning. At that time she was on the usual course, and was heading northwest. She had met with no difficulty up to that time, and was tight, staunch, and strong, and in no want either of wood or water. Her master says, however, that he found it would be a great risk to haul her off to get round the point, doubtless referring to his previous statement that he had kept her off her course to ease her in the sea. She was then sailing northwest, and her course up to the straits would have been, as the witnesses

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*Propeller Niagara v. Cordes et al*

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say, either west-northwest, or northwest by west half west, and there is no difference of opinion among them that the course was direct and the wind was a fair wind for steamers; and one witness says that in a conversation with the mate, while he was at Presque Isle, he heard him say that they need not have entered the harbor. All or nearly all the witnesses agree that there is no difficulty in entering that harbor in the daytime, and that the anchorage, though rather limited in space, is safe and quite good just northwesterly of the end of the pier and out towards the light-house, and that the harbor affords a good shelter to vessels in a storm, except when the wind is blowing from a northeasterly direction or east-northeast, and then that its course is directly into the harbor, which fact must have been well known to the master and mate at the time they decided to make the attempt. Many of the witnesses say that it is more difficult to go in during the night, and several testify positively that it is dangerous, and some of the more experienced navigators say they would not risk the attempt in a dark night. One witness, the master of the Plymouth, called by the respondents, testified that the steamer did not come right in; that she broached to so near the mouth of the harbor, that she was detained at least a quarter of an hour. She, however, succeeded in entering the harbor, and cast her anchor as before stated. Four experienced navigators testify to the effect that she should have kept on her course; that it was not proper to enter the harbor. On the other side, one witness says, that whether it was good seamanship or not would depend upon the position of the vessel; and that if she was near in, he thinks it was prudent, and that he should have entered. Another says that if he had considered either vessel or cargo in danger, he should have gone in by all means; and the mate says that they concluded that it was better to go in. One witness, called by the libellants, says he heard the mate say, after the disaster, that it was unnecessary.

These are the principal facts bearing upon the question, whether the master exercised a sound judgment and discretion in entering the harbor. Most of the facts in evidence respecting the acts of the master after he entered the harbor, as they

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*Propeller Niagara v. Cordes et al.*

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appear to the court, have already been stated, and need not be repeated. Experts were called and examined upon the question whether the master evinced proper skill and judgment in the attempt he made to anchor, and on that point three or four witnesses, who are experienced navigators, were called and examined by the libellants. They testify to the effect that a master of a steamer about to enter a harbor under the circumstances of this case ought to have both anchors ready, so that if one will not hold the vessel, he can cast the other; and they express the opinion that such precautionary steps are no more than ordinary prudence; and one of them says that it is customary to let go the small anchor first, and if that will not hold, then to let go the large anchor. On the other side, the mate of the steamer testifies that they had not time to let go the small anchor; and another witness expresses the opinion, that if the large anchor and the engine would not hold, then there was nothing that could be done; and the master of the Plymouth says that he knows of nothing else that could have been done, except to cast the anchor.

Numerous witnesses were examined on the question whether it was practicable to have removed the goods and stored them; and whether, if it had been done, it would have afforded any better protection to the goods. On this point the testimony of the witnesses is very conflicting. All that can be done is to state the principal facts, as they appear to the court.

Nineteen men were residing at Presque Isle at the time of the disaster, mostly temporary residents, in the employment of Frederick Barnham, a witness for the respondents. There were four dwelling-houses there in which people lived, and two unoccupied, and there were two barns and a vacant shop; all or nearly all the dwellings were built of logs, and were rudely finished. Three of those dwellings were within a half mile of the place where the steamer lay, which was within a quarter of a mile of a road extending round on the beach from the pier, where the Plymouth lay, with her officers and crew on board. Several days previously, the steamer Grand Turk had been wrecked, twelve miles distant from Presque Isle, and her officers and crew were there, consisting in all of

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*Propeller Niagara v. Cordes et al.*

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eight or nine men. There was a large scow in the harbor, in good order, anchored near the pier, and not in use, which several witnesses testify might have been obtained to lighten the steamer; and one witness testifies that the same scow was used by the mate in the spring following to carry the goods from the steamer to the dock, before she was taken off by the tug. Nine pumps, such as are used on board vessels, and brought up to use on the other disabled steamer, were lying on the beach, within a half mile. All the witnesses agree that the master of the Niagara never applied to any one of them for any assistance, either in respect to the goods or the steamer; and the mate admits that they had made up their minds to leave, the evening of the day after the disaster. Some of the witnesses offered assistance, and it was declined. Courtwright testifies that he heard a conversation between the master and the mate, in presence of fifteen or twenty persons, in reference to taking out the cargo of the steamer. The mate said to the master that they could get the goods out of the steamer, and get her alongside of the dock; to which the master replied, that it was too late in the season to do anything with her; that he was bound to go home; that he would not stop there for the steamer and all that was in her. Other declarations of the master, equally expressive of his determination to return home, are also in evidence; and being a part of the *res gestae*, are clearly admissible to explain the motives of the master, in connection with his acts. Many witnesses on the side of the respondents express the opinion that the goods could not have been removed; and an equal or greater number called by the libellants express a contrary opinion, and suggest various modes by which it might have been accomplished in a very short time. Such opinions, however, cannot have much weight in determining the question. One important fact is clearly proved, namely, that the ice went out of the harbor the night before the Plymouth left, and it was mild weather after that, for the most part, till near the middle of January, 1855.

Our conclusions upon these several questions may be briefly stated. In respect to the one first presented, it is proper to remark that it depends upon the proof whether the act of the

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*Propeller Niagara v. Cordes et al.*

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master, in seeking shelter in the harbor, was reasonably necessary; and if it was, then he is not in fault on that account. None of the circumstances exhibit such clear and decisive indications as would justify the conclusion that he did not think at the time that it was the most expedient course to be pursued. That he was without much experience as a master of a steamer of this description, does not seem to be denied; and it is equally clear that he had a strong preference for a sailing vessel, as is made evident by his own remarks, as well as in another fact proved in the case, that he has resumed his more favorite employment upon the water, for which, perhaps, he is better qualified than for the one in which he was then engaged. He says, in effect, that he found it would be dangerous to proceed on the voyage, and the mate says they concluded that it would be better to go into Presque Isle; and on their own opinions thus expressed, and the proofs as to the violence of the storm, his vindication mainly rests. Strong doubts are entertained whether he acted wisely in departing from the course of the voyage, and yet the evidence is not so full and clear in the case as to induce the court to place the decision upon that ground. Whatever dangers there were in entering the harbor, he succeeded in surmounting, and he cannot be held responsible for any accident which did not happen. Masters have a right, and oftentimes it is their duty, to seek shelter from a storm; and the fact that it would have been better to have kept on the course, may be more apparent now than it could have been to any one at the time. Something must be deferred to the judgment and discretion of the master on such occasions, so that although the circumstances tend strongly to prove that he misjudged, or was wanting in that fearless, prudent energy which he ought to have displayed, still they are not of that decisive character which incline the court to make the decision turn upon that ground; and the same remarks also apply to his acts, and endeavors to anchor the steamer after he entered the harbor. Knowing, as he did, that the wind was blowing directly into the harbor, it is difficult to see why it was that he brought the steamer round to the position in the wind, so as to expose her to the danger which finally

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*Propeller Niagara v. Cordes et al.*

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overcame his efforts to accomplish the purpose for which he says he sought the harbor. He knew the course of the wind and the difficulties of the undertaking before he entered, and ought to have been prepared to encounter them with the best precautions in his power to make. When he found that the anchor dragged, a great majority of the witnesses say he ought to have let go the other. His own description of what took place on the deck of the steamer after she entered the harbor, as well as that given by the mate, evinces an indecision and want of energy quite unsuited to the emergency in which he was placed, and tends strongly to show that he was wanting in the proper qualities of a skilful and well-instructed master. These considerations create strong doubts in the mind of the court, whether the respondents are faultless in this particular, and yet the court is disinclined to place the decision entirely on that ground, as several witnesses, of some nautical skill, have testified that they are unable to see that anything more could have been done.

On the remaining ground of complaints against the master, we are all of the opinion that he was guilty of gross negligence. His steamer lay within ten or fifteen rods of the beach, and within a little more than a half mile of the settlement, the number of whose residents was temporarily augmented by the presence of the officers and crew of the steamer Plymouth and those of the Grand Turk; and yet all he did, so far as appears, to secure or recover the large amount of property he had on board, was to go on shore, consult with one or more of the residents, advise with the master of the Plymouth, and then came to the conclusion that nothing could be done, and that it was best to leave the goods on board, under the charge of three of his crew. He remained, however, for two or three days, until the storm had subsided and the weather had moderated; and after two other steamers had arrived in the harbor, he took passage on the Plymouth, and returned home, without having made any effort himself, or requested the aid of others, either to get off the steamer, or to remove and store the goods. We are satisfied from the evidence that the goods might have been removed between the time he left and the middle of January,

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*Union Insurance Company v. Hoge.*

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and we are not satisfied that it could not have been done or successfully commenced during the time he remained in Presque Isle. A removal of a part would have enabled him to protect the residue on board; and there is no sufficient ground from the evidence to conclude that he would have encountered any serious difficulty in finding places enough for storing to have enabled him to remove from the steamer all of that class of goods exposed to damage, and store them on shore. At that time the goods had not received any considerable injury, and most of them, in all probability, none whatever. Prompt attention would have saved the property and protected the shipper from loss. It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, when it is practicable for human exertions, skill, and prudence, to save them from the impending peril.

This view of the evidence renders it unnecessary to consider the other grounds of defence set up by the respondents.

The decrees, therefore, of the District Court in the respective cases are affirmed, with costs, in each case for the libellants.

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**THE UNION INSURANCE COMPANY, PLAINTIFFS IN ERROR, v. JOHN BLAIR HOGE.**

Under a general act of the Legislature of New York, passed on the 10th of April, 1849, which authorized the incorporation of insurance companies in the State under it, held that the eighth section in the charter of a mutual insurance company formed under the general act, which provided for the payment of cash premiums, at the election of the insured, as well as premiums secured by notes, was authorized by the general act, and that a policy issued upon a payment of the premium in cash was legal and valid.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the northern district of New York.

It was an action brought by Hoge upon a policy of insurance upon a paper-mill in Virginia. The insurance company were

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*Union Insurance Company v. Hoge.*

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incorporated by the Legislature of New York, and their place of doing business was in that State. The law of New York and charter of the company are set forth in the opinion of the court.

The declaration stated that the policy of insurance was made in November, 1851, for the consideration of fifty-six dollars, and that for that sum the company agreed to insure the mill for one year to the amount of \$2,500. The plea was, that the business of the company was to be conducted on the plan of mutual insurance, and that the receiving of a definite sum of money, in lieu of a premium note for the policy of insurance, was not warranted by the act of 1849, and that the policy was void, as made without authority, and in violation of the statute.

To this plea there was a demurrer.

The Circuit Court decided that the policy was a valid policy, and the company brought the case up to this court.

It was argued by *Mr. Van Der Lyn* for the plaintiffs in error, and *Mr. Mygatt* for the defendant.

*Mr. Van Der Lyn* made the following points:

POINT FIRST.—The issuing of policies upon the plan of stock companies, and the receiving of a definite sum in lieu of a premium note, is not warranted by the act of 1849, and is in violation of its manifest spirit; and therefore the policy declared on is void, being made without authority and in violation of the statute.

We say this for several reasons:

1. This is a mutual insurance company, formed to do business on the plan of mutual insurance, and is so declared in the charter, in pursuance of the act of 1849, sec. 10. (See 2d sec. of the charter.) "Its business shall be conducted on the plan of mutual insurance." The company was organized without a dollar of cash capital, and with \$100,000 of premium notes, (secs. 5 and 11,) and was prohibited from commencing business without \$100,000 of premium notes. The act has not a word, or a provision, indicating the right to do business after the stock or cash plan, and a corporation can exercise no powers not expressly granted, or that are not necessary to carry



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*Union Insurance Company v. Hoge.*

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into effect those that are granted. (See authorities cited under point third, *post*.) And, moreover, that statute expressly prohibited the commencing business on the stock plan without \$50,000 of *cash capital*.

2. The company, being organized under the general act as a *mutual* company, and with a capital made up of premium notes, by direction of the statute, the Legislature, by the term "*mutual insurance*," used in the act, must be deemed to have adopted the term as it had become known in the legislation of the State, and as expressed in the Jefferson and Madison County Mutual Insurance Company charters. (Laws of 1836, pages 42 and 89.) In these acts of incorporation, the members were "all persons who should insure." (Sec. 2.) "Each person, before he received his policy and became a member, must deposit his *premium note*, and pay a sum in cash not exceeding five per cent.," (sec. 6,) and the members were bound for losses to the extent of the said note, and, in addition, one dollar for every \$100 of the sum insured on the mutual principle. (Secs. 8 and 11.) Over thirty companies were chartered the same session after this pattern act; and in subsequent sessions, I may say, that out of New York city nearly or quite every mutual insurance company was chartered after this pattern act, there being twenty or thirty charters each session referring to and adopting it. In May, 1834, the Saratoga Company had been organized under a similar act, requiring a premium note; and previous to that, the Schoharie Company and the Washington Company were chartered, with similar provisions, except the omission of the premium-note feature. We say, therefore, that in 1849, when a general act was to be passed, it had become a settled feature in the mutual insurance companies, that a *premium note*, instead of a cash premium, was essential to the idea of a mutual company; and that interpretation of the word "mutual" was clearly indicated by the requirement, in *mutual companies*, of a capital made up of *premium or deposit notes*, instead of a *cash capital*, which was required in companies organized on the plan of stock companies and in life insurance. (Act of 1849, p. 441, secs. 5 and 6.) It certainly will not be insisted that the Legislature intended

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*Union Insurance Company v. Hoge.*

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to follow the example of the companies which had been chartered in New York, with a cash premium instead of a premium note; if so, they would have required the capital to consist of cash premiums; and, besides, the failure of those companies operated as a beacon of warning to the law-makers against any such system. An additional reason to the almost universal prevalence in the State of New York of the mutual companies, on the plan of the Jefferson County Company, and the great success of that system, and to the requirement by the act of a capital in the mutual companies composed wholly of premium notes, and the entire omission of any authority in the act to allow a business to be commenced by the mutual companies in part or in whole on the stock plan; and the impracticability of pursuing the mutual principle when part of the members are obtaining policies on the cash or stock plan, and a part on the mutual plan, and the entire abandonment of the *mutual principle* by such a course; I say, an additional reason to infer the intent of the Legislature is found in the prevalence of this premium-note principle in the other States. (Angel, 424, sec. 418.)

In Indiana, Connecticut, Maine, Massachusetts, Vermont, Illinois, New Hampshire, Pennsylvania, and many others, the Legislatures, at the time of the act in 1849, had adopted the premium-note system, as we claim it to be. I infer this from the decisions of their courts, without an actual examination of the acts in the several States.

3. It is some evidence of the necessity of having legislative authority for issuing policies for a definite sum paid in cash in lieu of a premium note, that a special enactment has been resorted to for that purpose, instead of coming in under the 14th section of the general act, which would have given the power, if it were possible, under the provisions of that statute.

(Session Laws of New York, 1849, pp. 436, 184; *ibid*, 1850, p 337; *ibid*, 1852, pp. 27, 399, 65; 3 Ohio, N. S., 348.)

4. Another and to our minds a conclusive objection to the exercise of this power of receiving a definite sum in lieu of a premium note (without an express legislative sanction) is, that it destroys the principle of *mutuality*, which is the leading char-

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*Union Insurance Company v. Hoge.*

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acteristic of mutual companies formed under the act of 1849, and confounds the operation of a company "*organized to do business on the mutual plan*," with that of those companies which are *organized on the plan of stock companies*, and which are in their nature and principles *antagonistic* to the mutual companies.

To illustrate this idea, suppose that an individual desires to make an insurance in a mutual company. He makes his application, and receives a policy for \$1,000, and executes a premium note for \$100, and pays in addition five per cent. of that sum in cash. If the company is prudently and successfully managed, this five per cent. will pay expenses and all ordinary losses. But he is liable to pay, if any exigency like a disastrous fire renders it necessary, upon a just assessment, the whole of his \$100 note, to satisfy the losses of any of his associates, who have also given their premium notes; and *all* who have given premium notes *share in this contribution*, which constitutes the principle of *mutuality*. Now, let us suppose that he applies to and is insured in a stock company; he gets his policy for \$1,000, and pays for it one per cent., \$10. He is entitled to the same indemnity in case of a loss as he was in the mutual company; but when he pays his premium, he ceases to have any further interest in the successful operation of the company; he is the *insured*, but not the *insurer*; and whether the company make gains or suffer losses, matters not to him, provided the company continues solvent. In the *mutual* company, he was not only *the insured*, but he was also *one of the insurers*, and suffered a loss by the loss of any one of his fellow-members. Now, suppose he insured in a mutual company by paying a definite sum in lieu of a premium note; and we will suppose that he pays one per cent., (for unless a mutual company insures at the ordinary stock rates, it would soon cease to make cash insurances;) he would pay \$10, and get his policy. And, now, what is his situation as to his fellow-members of the company? He gets the same indemnity as he did in the mutual company, on giving his premium note, and the same he got in the stock company, but he is no longer interested in the successful operation of the company; he suf-

*Union Insurance Company v. Hoge.*

fers nothing by the losses of his associates, and is not liable to contribute in any manner for their relief; he is the *insured party*, just as he is in the stock company, but he is not the *insurer*; on the contrary, *all the premium-note makers are the insurers*, and stand in precisely the condition of stockholders in a stock company; and in this way, and by this device, the *makers of the premium notes* are turned into a *stock company*, and become *insurers* to stock policy holders, to a ruinous amount, without any liability on their part to contribute to any loss whatever.

Rhinehart v. All. Mut. Co., 1 Barr Penn. Rep., 359.

Angel, p. 424.

Bangs v. Gray, 2 Kernan, 477, 479.

7 Watts and Sergt., 349, 351, after saying, "That any person insured is a member of the company," Gibson, Chief J., says: "And on no other plan could a *mutual company* be constituted, the object of the members being to share each other's losses for the general weal, and *not to bear the risk of losses for a premium*"—which is quite significant, when we remember that the stock companies *bear the risk of losses for a premium*.

Mutual Benefit Company v. Jarvis, (22 Conn., 133, 145.) This was a mutual life insurance policy, and a case where the policy was payable in cash. The court adopt a particular construction to sustain the *mutual principle*:

"This makes between all the members that *mutuality* in regard to profits and losses which was contemplated by the charter and the organization of the company; and if the company can collect such notes as it pleases, without making an equal assessment on all, it is clear that there is an end of everything like *mutuality*."

5. There is another consideration which serves to show that this practice of receiving a definite sum in lieu of a premium note is wholly unwarranted by the spirit of the act of 1849. It is quite easy to demonstrate that a company might, in the course of two or three years, entirely change the charter of a mutual insurance company into that of a stock company, without having at the outset a dollar of cash capital. Suppose that, when a company is organized, it received notes to the required sum of

*Union Insurance Company v. Hoge.*

\$100,000, and issued policies thereupon, all of which expire in one and two years. The officers, under a charter framed by themselves, (but in violation of the act, as we say,) commence doing business on the cash principle, and proceed for a year or two, issuing cash policies, but no policies on premium notes. In the mean time, all the mutual policies have expired, and the company finds itself doing business on the *stock* instead of the *mutual principle*, and is transmuted into a stock company (if we are to believe our opponents) by a legitimate exercise of their powers as a mutual company. It has lost its identity, and the character impressed upon it by its organization, and has become a company of a totally antagonistic character. It has done this without a dollar of cash capital, and in defiance of the prohibition in the 7th section, by which the company was forbidden to *commence*, that is, to *do any business*, as a stock company, without a stock capital. Such is the absurdity into which our opponents are driven by their own hypothesis.

6. In opposition to the views above expressed, it is argued by our opponents that the phraseology of the act, and the meaning of the words "capital" and "premiums," as used in the act, justify a construction that would allow the directors of a mutual company to receive a cash premium in lieu of a premium note. This argument is founded on the idea, that the word "premium" means a "*cash premium*," and the word "capital" a "fund" *absolutely* devoted (like a stock capital) to the payment of the debts of the corporation, and not *merely subject to the payment of the debts on the mutual principle*.

To this we answer:

1. That the act in question was drawn by an unpracticed hand, and words are used in it without a precise and constant signification, so that the meaning of the law-makers is to be ascertained by the collocation of the words and the context, and manifest intention of the Legislature.

2. Adopting this rule, it is manifest that the word "capital" is used in a general sense, as embracing all the funds of the association. In the 5th section, the deposit notes on which the business is to be commenced are said to be *a part*

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*Union Insurance Company v. Hoge.*

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of the capital, looking to the future premium notes with the five per cent. cash added; and if any investments be made under section 8th, to those also as constituting the *whole capital*. In section 11th, it represents the *whole capital in possession* of the associates at the time of organization, consisting of "premiums," that is, "premium notes or engagements of insurance." In section 13th, it means the *whole fund* of the company, embracing (1) the premium notes on which the company commenced business; (2) those to be received afterwards, in the course of its business; (3) with the cash part of the premium, or five per cent., in addition to the premium note; and in the 21st section, it means the same thing as in the 13th section, with the addition of a cash capital united under the provisions of that section.

3. So also the word "*premium*" is used in a general sense to represent "the consideration of a policy," whether *paid*, as in the case of a stock policy, or *secured* by a premium note, as in the case of a mutual policy. Such is its meaning, *necessarily*, in the 5th section, because the \$100,000 is to be composed wholly of notes; and equally so in the 11th, because the act is describing precisely the *same fund*. Though, from a looseness of language, the act appears to regard the fund as composed of the *notes*, or the *engagements of insurance*, before they have been consummated into notes, though the 5th section requires them to have been perfected by and merged in notes; and in the 13th section, the word "premiums" clearly represents the premium notes, including the original \$100,000, and such as have been subsequently taken, with the five per cent. in cash added, to make up the entire premium in any given case; and the word means the same thing in the 21st section.

4. The above is a reasonable and natural construction, and is to be preferred to one that would *confound* the two companies, and their practice and operations; would destroy the principle of mutuality, which is the basis of the mutual companies, and lead to a constant violation of the 7th section of the act.

POINT SECOND.—There is no force in the pretence that the *definite sum*, which is to be taken in *lieu* of a premium note, is

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*Union Insurance Company v. Hoge.*

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really an *equivalent* for a premium note. This pretence is deceptive and fraudulent, and so transparently absurd as to deceive no one.

1. It can never be an *equivalent* for a premium note, unless the sum is as large as that expressed in the premium note. In the case I have supposed, it would be \$100 on an insurance of \$1,000. Was it a supposable case that such a sum would be paid, and were it within the spirit of the act, that would be an *equivalent*; but the idea that any sane man would ever take an insurance in a mutual company, and pay for it anything over the ordinary cash rates of a sound stock company, is preposterous, and requires no answer. This must have been well understood by the officers when they devised this substitute for a premium note.

2. It was never the intention of those persons who procured an amendment of their charters, and obtained by statute an authority to do what this company has done by *usurpation and without authority*, to do anything but a business *on the plan* of stock companies, as well as the mutual. The premium note was intended to be so large as to meet all possible contingencies, and no one was expected to have to pay the whole of it, if the company was conducted prudently. How, then, was it expected that individuals would pay in cash any such sum? What motive was there to pay over the ordinary stock rates?

See the Statutes cited in sub. 3, under Point First.

3. There can be no mistake in the case of this company, because the directors, who framed the by-laws, have stated the definite sum to mean the ordinary stock rates in the fundamental laws for the practical operation of the company.

POINT THIRD.—Conceding that the receiving a definite sum in lieu of a premium note was a practice not authorized by the statute of 1849, and in violation of its provisions, the insertion of such a power in the charter would not legalize such practice, especially as those who dealt with the company on the plan of stock insurance had legal notice of the powers of the mutual company.

1. Those who are insured on the basis of the stock principle are chargeable with *legal notice of the powers of the corporation*

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*Union Insurance Company v. Hoge.*

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a. The act of 1849 is a public act, of which all must take notice; and the act requires a copy of the charter to be filed in the office of the Secretary of State, and of the county of Montgomery, which is sufficient notice.

Dutchess Cotton Manuf. v. Davis, 14 John., 238, 245. See the latter page.

b. The name of the company indicates that it was a *mutual insurance company*, and the by-laws and conditions attached show the principle of assessment on which the premium notes were liable; and a dealer who knew that the company was a *mutual one* was bound to take notice that the officers of a mutual company, under the act, had no power to insure on the plan of stock insurances.

c. All who deal with a corporation are bound to know the powers of the corporation with which they deal or connect themselves.

4 McLean's Rep., 8.

Root v. Goddard, 3 McLean's Rep., 102, 276.

Mumma v. Potomac Co., 8 Peters's Rep., 287.

Though not a *technical estoppel*, it is nevertheless *notice*.

2. The corporation was an artificial person with limited powers, embracing only those *expressed*, and such as are necessary to carry into effect the expressed powers.

1 R. S. of N. Y., 599, 600, secs. 1, 2, 3.

2. Kent, 279, 299; their powers are to be *strictly construed*.

Angel and Ames on Corporations, (2d ed.,) 64 to 67, 192, 193, 200.

Chitty on Contracts, 536, 539.

People v. Utica Ins. Co., 15 J. R., 388.

Thomas v. Achilles, 16 Barb., 494, 495.

N. Y. F. Co. v. Ellery, 2 Cowen, 709, 699.

N. R. Ins. Co. v. Lawrence, 3 Wend. Rep., 574, 583, 482.

Beatty v. M. Ins. Co., 2 John. R., 109, 114.

W., 81, 84.

Safford v. Wykoff, 1 Hill, 11; 2 ib., 243.

Eng. L. and Equity, 7, 505; 16 ib., 180; 30 ib., 120.

3. The corporation not only had *no power* to issue stock pol-



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*Union Insurance Company v. Hoge.*

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icies by the act, but the doing of these acts was expressly *prohibited* by section 7 of the act, and were *void* for that reason.

Tracy v. Tallmadge, (4th Kernan, 179,) Selden, J.: "It has long been settled that contracts founded on an illegal consideration," "or prohibited by some positive statute, are void." "That a contract by a corporation which it has no legal power to make, is void, and cannot be enforced, it would seem difficult to deny."

Page 204, Comstock, to the same effect in the note.

Mr. Mygatt, for the defendant in error, stated that the claim of the defendant in error was, that the assets of the company were liable to pay *pro rata* all the liabilities.

The leading questions presented are:

1. Was the cash policy of insurance on which this action was brought *ultra vires*?

2. Are the premium notes of the company capital stock, and, as such, liable to pay *pro rata* the losses and liabilities of the company?

POINTS AND ARGUMENT.

FIRST.—The issuing of policies by this company for a cash advance premium was not unlawful. It was not the exercise of a power not granted or forbidden by the act of April 10, 1849, but it was the exercise of a lawful, a necessary, and a proper act.

1. This question was distinctly presented for the decision of the Court of Appeals of New York, in the case of White, receiver, against Haight, which case was decided at the last December term, and the judgment in favor of the receiver affirmed, on the ground that the note in that action formed part of the original capital of \$100,000, and was collectable without any allegation of losses, and without an assessment. That case is reported in 16 New York Reports, 310, but the opinion of Denio, C. J., only is reported. Opinions were written by two others of the then members of the Court of Appeals, and this question is debated by said two of the members, to wit: Mr. Justice Brown and Mr. Justice Shankland.

[The extracts from these two opinions, as cited by the counsel, are too long to be inserted.]

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*Union Insurance Company v. Hoge.*

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It appears, from said opinions, that said justices regarded the payment of an *advance cash premium* as the lawful and proper exercise of the powers granted by the statute and the charter, and as beneficial to the members; and that, by the well-known and continued course of business of the company, the policies issued therefor precluded the company from repudiating these contracts issued to those who parted with value upon the faith of, and in consideration of, their interest in the company.

It is claimed by the plaintiff in error, that the aforesaid opinions of Judges Brown and Shankland discussed questions not material to the decision of the case before them, and not decided in the Court of Appeals. It may be said that the reported opinion by Judge Denio does not debate the questions here presented, as the court decided that case on a point not material to this case. It may, however, be proper to state that the opinions of Judges Brown and Shankland are referred to as above, as it is respectfully submitted, that although that case was decided on a point before coming to the questions that were debated by Judges Brown and Shankland, yet that the questions debated by them were in fact in that case, and the opinions of these able judges are authority, if not decisive, on the questions in this case.

2. *This is not a mutual insurance company, with a stock branch engrafted on it. It is purely a mutual insurance company, and as such has power to issue policies of insurance for a cash premium or premium note, or both.*

This company was formed under a general law which was passed at the next session of the Legislature after an amendment of the charter of the Albany County Mutual Insurance Company. By its charter, like to the Albany Company, it expressly allows of the cash premium in the place of the premium note, or of both the cash premium and the premium note.

In order to correctly examine this point, it is indispensable well to understand the peculiar characteristics of mutual insurance companies. Stock companies insure at their own risk, "but the leading principle of mutual insurance compa-

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*Union Insurance Company v. Hoge.*

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nies is, that each person whose property is insured becomes a *corporator*, or a member of the company."

Angel on Fire and Life Insurance, 45, sec. 10.

Susquehanna Ins. Co. v. Perviere, 7 Watts and S. Penn. R., 348.

Liscomb v. Boston Mutual Fire Ins. Co., 9 Metcalf, 205.

"A mutual insurance company in its origin was a body of persons, each of whom was desirous of effecting an insurance, and he agreed with the rest of the members to contribute his premiums to a common fund, on the terms that he should be entitled to receive out of that fund."

Dodeswell, 22.

Angell on Fire and Life Ins., 422, sec. 418.

"The whole body becomes reciprocally bound to make good the losses, and are literally mutual insurers." *Ib.*

Parsons says that there are "mutual companies in which every one who is insured becomes thereby a member."

Parsons on Mercantile Law, 489.

Reynolds on Life Assurance, p. 180, refers to the difficulty of collecting assessments on notes which are often of trifling amount, and are liable to be called on for frequent assessments, and then remarks: "To obviate these objections, another modification of the mutual system has been introduced by some companies, which is for the assured to pay the whole premium in cash."

"The giving of the premium note is not necessary to the consummation of the contract of insurance."

Blanchard v. Waite, 28 Maine, 51.

This company was purely a mutual insurance company.

The case of the Utica Insurance Company v. Bristol, decided at the general term in the 5th district of New York, in which case the opinion of the court is by Justices Allen and Pratt, was the case of a stock branch engrafted on a mutual insurance company. That action was upon a subscription to the stock branch, and the charter in that case was held to be in conflict with the provisions of the law.

The opinion of Mr. Justice Pratt in that case shows that said action was not on a premium note, but on a subscription

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*Union Insurance Company v. Hoge.*

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to the stock branch. The cash capital in that company was not united with the premium and stock notes as security for the members generally, for it was provided in that company that this cash capital should not be held as security for or liable for the losses of the mutual company.

This company had no such provision. The premium notes, and cash paid for policies in lieu thereof, were alike capital stock, and liable for the losses.

Mutual insurance companies were formed in Ohio in 1844, with charters like the one in question. In the *Ohio Mutual Insurance Company v. Marietta Woollen Factory*, (3 Ohio State Reports, new series, 348,) it was held, that in cases of losses on policies issued on cash premiums, the cash fund must be first exhausted to meet said losses, and then resort may be had to the premium notes. The charter of that mutual insurance company provided for the payment "of a certain definite sum of money in full for such insurance, which said sum shall be in lieu and place of a premium note;" and the charter further declares that this cash "fund, and the premium notes deposited with the company, shall constitute the capital stock of the company, for the payment of losses and expenses."

This same question has been adjudicated in the Superior Court of the city of New York. In the case of *Tuckerman, receiver, v. McLean*, in the Superior Court of New York, where the defence in an action on a premium note was, that it was assessed to pay cash-policy losses. By the court, Duer, Justice: "This is clearly no defence. The company had the right by statute and their charter to receive cash premiums, and issue policies on them, and the defendant's note has been greatly relieved by the practice. It was the best thing the company could do. These notes are the basis of the transactions of the company, and they must be paid when the cash is exhausted. The plaintiff is entitled to judgment."

In the said case, *Tuckerman* was receiver of the *Cherry Valley Mutual Insurance Company*, a company with a charter like the one in question, and the action was for an assessment to pay cash-policy as well as premium-note-policy losses.

This question was also decided at the general term of the

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*Union Insurance Company v. Hoge.*

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Supreme Court of New York, in the sixth district, in the said case of *White, receiver, v. Haight*; Justices Mason, Gray, and Balcom, concurring in the decision.

Justice Harris held, in *Shaughnessy v. The Rensselaer Insurance Company*, (21 Barb., 610—Supreme Court,) that in a company incorporated under the act of 1849, which company had issued policies for cash premiums, "that the deposit notes were liable to assessment only when, after applying the funds of the company to the payment of the losses, it should be found necessary."

The cash premiums had "been expended in the payment of losses and expenses, and thus relieving former members from assessments upon their notes, and leaving others to be assessed for the payment of subsequent losses."

So in the company under consideration. The cash premiums were expended.

3. This company had power to issue policies of insurance for a cash premium.

The plaintiff in error's argument is, that these cash policies engrafted a stock branch upon a mutual insurance company, and that said cash policies should be repudiated as *ultra vires*.

Admit, for the argument, that the act of April 10, 1849, contains no express authority to the corporation to issue policies for a cash premium, it does not follow that the corporators are not answerable for losses arising from said policies, in their corporate capacity. The company have received value for them in cash, and it hardly comports with fair dealing that they should seek to exonerate themselves from a debt on this account, contracted by and through their accredited directors. It is not true that a corporation cannot bind the corporators beyond what is expressly authorized in the act of incorporation. There is power to make policies of insurance; and if a series of such contracts, based on a cash premium, have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted, *unless it can be established that cash in hand is not as good as a premium note.*

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*Union Insurance Company v. Hoge.*

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The Court of Appeals in New York say, in *Conover v. The Mutual Insurance Company of Albany County*, (1 Comstock, 292,) "Incorporated companies, whose business is necessarily conducted altogether by agents, should be required at their peril to see to it that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually, and as a part of their system of business, transcend those powers. How else are third persons to deal with them with any degree of safety?"

As it is the object of all law to promote justice and honest dealing, when that can be done without violating principle, what principle is violated by holding this corporation liable for the contracts of its accredited agents, even if not expressly authorized, when these contracts were entered into publicly, and in such a manner as by necessity and irresistible implication to be within the knowledge of this company, and of the corporators generally? The circumstance that the corporation itself received the benefit of these cash premiums renders the conclusion irresistible, that the corporation should pay these cash losses from any and every available means.

The affairs of this company are, by its charter, to be managed by its directors, and the directors are "elected by persons holding the policies of insurance in this company, or their proxies, and one vote shall be allowed on every one hundred dollars insured."

The tenth article of the charter before referred to provides, that "the directors may determine the rates of insurance and premium notes therefor," and "that any person applying for insurance may pay such advance cash premium on the amount insured as may be fixed by the company, and give no premium note."

The eleventh section, which provides that the charter be examined by the Attorney General, requires, if a mutual company, that it has the requisite capital, premiums, or engagements of insurance to the extent of the \$100,000. Nothing is here said about premium notes, but the word *premium* is used. It was never intended that these companies should limit their business to those who entered into the first agreements of in.

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*Union Insurance Company v. Hoge.*

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insurance, but, as allowed in the first section, the company was formed to make insurance.

When the charter and act of incorporation and the statute are silent as to what contracts a corporation may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created.

Angel and Ames on Corpor., 2d Am. ed., 200, and cases

The creation of a corporation for a specified purpose implies a power to use the necessary and usual means to effect that purpose; and though their charters were entirely silent on the subject, banks would necessarily be empowered to issue and discount promissory notes and bills of exchange, and insurance companies to make contracts of indemnity against losses by fire.

Ketchum v. The City of Buffalo, 21 Barb., 300.

Broughton v. Manch. Water Works Co., 3 Barn. and Ald., 11, 12.

Yarborough v. Bank of England, 16 East., 6.

Murray v. East India Co., 5 Barn. and Ald., 204.

Edie et al. v. East India Co., 2 Burr., 1216.

Corporations are liable even for torts and trespasses, but their charter does not authorize them.

Beach v. Fulton Bank, 7 Cowen R., 485.

Life and Fire Ins. Co. v. Merchants' Fire Ins. Co., 7 Wend. R., 81.

The case of *Stoney v. The American Life Ins. Co. et al.* (11 Paige, 635) decides that the negotiable security of a corporation which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company, and in violation of the laws of the State where it was actually issued.

When corporations "confine themselves to the purposes and objects of their incorporation, they should not be deemed as transcending their authority, but should be regarded as acting within the scope of those implied incidental powers

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*Union Insurance Company v. Hoge.*

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necessary to the full and advantageous development of those which are expressly given."

Mead v. Keeler, 24 Barb. N. Y. Sup. Ct. R., 24.

Where a statute authorizes a company to construct certain works, as a harbor, it is to be presumed they have power to execute all works incidental to their main purpose, and which they deem necessary, provided they act *bona fide*.

Wright v. Scott, (in House of Lords,) 34 Eng. Law and Equity, 1.

"If the charter be wholly silent as to the power of the insurance company to give credit for premiums, and to take notes in payment, such a power necessarily results from its power to make insurances, and to enable it advantageously to conduct its business."

McIntyre v. Preston, 5 Gilm. Ind. R., 48.

When by its charter a company is prohibited to insure on property to an amount exceeding two-thirds of its value, yet if the company voluntarily insure to a greater amount, without any fraud on the part of the insured, the policy is not thereby void.

31 Maine, 220.

By the 21st section of the act, the company may "*unite a cash capital to any extent, as an additional security for the members, over and above their premium and stock notes.*"

This word "premiums," as here used, establishes the right of this company to receive advance premiums for policies. The certificate of the Comptroller is, "that the company are in possession of the capital, premiums," or "engagements of insurance," as the case may be.

To constitute a mutual insurance company after the statute capital of \$100,000, it is not required that the premiums consist of premium notes, as assumed by this company.

The 18th section of the act regards the premiums as the capital stock of the company, for it reads: "And if, upon due examination, it shall appear to the Comptroller that the losses and expenses of any company chartered on the plan of mutual insurance, under this act, shall, during the year, have exceeded the premiums."



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*Union Insurance Company v. Hoge.*

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The word "premiums," as here used, may consist of premium notes, or cash paid for policies. The "premium," as defined by the early writers, "is a sum of money paid by the assured to the underwriters, in consideration of his taking upon himself a *risk*—the risk of having to indemnify the assured from any loss that may be sustained by an exposure to the perils of the sea, and to fire upon land, or the event of death." Lord Mansfield says: "The underwriter receives a premium for running the risk of indemnifying the assured."

*Tyne v. Fletcher*, Cowp. R., 666.

Webster defines the word "premium," "The recompense to underwriters for insurance, or for undertaking to indemnify for losses of any kind."

Bouvier defines "premium" "as the consideration paid by the insured to the insurer, for making an insurance. It is so called because it is paid *primo*, or before the contract shall take effect."

In *Hone* and another, receivers, *v. Allen & Paxson*, reported in the note to *Brouwer v. Appleby*, (1 Sand. Sup. Ct. R., 184,) Jones, Ch. J., says: "The company purports to be a mutual insurance. Originally, mutual insurance was where all the insurers agreed to apportion all the losses among themselves ratably." The learned Chief Justice says, further: "The system underwent various modifications. Notes were dispensed with, to rely on premiums only, or on insurances agreed for, as soon as the company was ready to make them. In this respect, the parties were left much to fix their own standard."

Article 10 expressly allows this premium to be paid in a definite sum in money, in full for said insurance, and in lieu of a premium note.

The receipt of cash premiums is but the necessary exercise of the corporate powers allowed by statute. There is no prohibition against taking the cash premiums, and would it be a legitimate satisfaction of the law to deny a recovery, and thus, instead of punishing, to reward the wrong-doer, and that at the expense of the innocent and injured creditors?

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*Union Insurance Company v. Hoge.*

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In *Beers v. The Phoenix Glass Company*, (14 Barb. N. Y. Sup. Ct., 868,) the court say :

"It would be difficult if not impossible to specify every act which might be necessary or useful to effectuate the objects for which the corporation is created. The general principle that corporations must confine their operations to their legitimate business, is sufficiently definite. It is not necessary, nor would it be useful, to restrict them in the manner of conducting such business."

In the State of New York, the principle of mutual insurance was sought to be worked out, not only by premium notes, and by the payment of a cash advance premium, but, in the same company, the premium on some of the policies is frequently secured by the premium note, and on other policies by cash paid in lieu of the note.

The act incorporating the Schoharie Mutual Insurance Company allowed the making of contracts of insurance "for such term or terms of time and for such premium or consideration as may be agreed on."

Session Laws of New York, 1831, p. 280, sec. 2.

The act to incorporate the American Manufacturers' Mutual Assurance Association also allowed contracts of insurance to be made for "such premium and consideration as may be agreed on."

Session Laws of New York, 1832, p. 129, sec. 2.

The act incorporating the Washington Co. Mutual Insurance Company also allowed contracts of insurance "for such premium or consideration as may be agreed on."

Session Laws of New York, 1834, p. 182, sec. 2.

The word premium-notes finds no place in said acts, and the last-named company issued more than 200,000 policies of insurance.

See Comptroller's Reports on Insurance Companies.

The Albany County Mutual Insurance Company was incorporated in 1836, (Session Laws of New York, 1836, p. 315,) subject to the same restrictions and limitations as the Jefferson County Mutual Insurance Company, and was incorporated the same year; and yet, in 1848, the Albany charter was amended

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*Union Insurance Company v. Hoge.*

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by allowing the payment of a cash premium in lieu of the premium note; which cash premium is made the primary fund for the payment of losses and expenses, and both the cash premium and the premium notes constitute the capital of the company for the payment of losses and expenses.

Important is this amendment, as the charter in question assimilates thereto. Said amendment is as follows:

“SEC. 1. It may and shall be lawful for any person or persons applying for insurance in the Mutual Insurance Company of the city and county of Albany, at his, her, or their election, to pay to said company a certain definite sum of money in full for such insurance, which said sum shall be in lieu and place of a premium note; and such person or persons shall not be liable to said company, during the continuance of his, her, or their policy, for any sum beyond the amount thus originally paid.

“SEC. 2. Such sum or sums of money as shall be paid to said company, as aforesaid, shall be retained as a fund for the payment of losses and expenses which may happen or accrue in and to said company, which said fund shall be exhausted before a resort shall be had to assessments upon the premium notes deposited with said company; and this said fund and the premium notes deposited with said company shall constitute the capital of the company for the payment of losses and expenses.”

Session Laws of New York, 1848, p. 66.

The universal course of business of over fifty companies formed in the State of New York under this act, was to insure for a cash premium.

The real question here is, whether this company, by its agents and the consent of its corporators, could carry on its business in any given mode, and act contrary to the general course of business of such corporations, so long as it prove profitable to the company, and, when a disaster occurs, be allowed to shield themselves from liability by a resort to a more than literal construction of their charter powers, which they themselves had extended by a liberal construction of its terms.

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*Union Insurance Company v. Hoge.*

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It would seem that there could be but one answer; and such is the uniform current of the more recent decisions upon the subject.

The law of the Court of Appeals of New York, as applicable, is well stated in the recent case of *Curtis et al. v. Leavitt*, (15 New York Reports, 9,) where the faith of promises and the inviolability of contracts are maintained as follows:

Comstock, J.: "Corporations, it is said, can act only in accordance with the law which creates them. But if law authorizes them to do acts specifically, and is silent as to the manner and means of doing those acts, where is the restriction, except such as the nature of the business implies?"

Brown, J.: "Can the corporation take to its own use the moneys realized from third parties upon the faith of its validity, and then repudiate the authority by which it was created? If the act done was within the power of the corporation, it must fall within the law of ratification and confirmation so universally applied to the conduct of those who maintain towards each other the relation of principal and agent. This law should apply with quite as much force to corporate bodies as to natural beings, because, in respect to the latter, the principal may and often does act without the intervention of an agent, and, in case of doubt, recourse may be had to the principal himself. Not so with an artificial being. It can only act by and through its officers."

Paige, J.: "Every corporation has certain powers and capacities, which are at common law incidental to its existence. Among these are the powers to take and grant property, and to contract obligations. (2 Kent's Com., 278; 15 Johns., 383; 4 Wheat., 568; 1 Kid. on Cor., 13, 69, 70.) These general powers may be curtailed by the act of incorporation, and restrained and qualified by the nature and object of the corporation. When the charter is silent as to the contracts which a corporation may make, it has, as incidental to its existence, the power of making all such contracts as are necessary and usual in the course of the business it transacts, as a means to attain the object for which it was created. (Ang. and A. Corp., 83, 84, 245, 3d ed.; 2 Kent's Com., 218, note 2, 7th

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*Union Insurance Company v. Hoge.*

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ed.; 15 John., 888, per Thompson, J; 1 Sand. Ch. R., 288, 289.")

"The general understanding in respect to the construction of a statute, and the usage of all persons in a particular business in accordance with such understanding, is always regarded as of great weight in fixing the construction of such statute, '*contemporanea expositio est optima, et fortissima in lege.*' (Broom's Legal Maxims, 532.)"

In the case of Eastern Counties Railway Co. v. Hawkes, in the House of Lords, the Lord Chancellor, (Lord Cranworth,) and Lords Brougham, Campbell, and St. Leonards, concur in opinion. (35 Eng. Law and Equity, 8.) The final opinion concludes as follows:

"I trust that this decision, and the decisions of this House during the present session, in the cases of the National Exchange Company v. Drew, 2 Macq., (Sc. Ap. cas.,) 108, and in Bargate v. Shortridge, 4 H. L., cas. 297, (s. c. 81 Eng. R., 1) will place the powers and liabilities of directors and their companies, in making contracts and in dealing with third parties, upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established, but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot clearly be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons in relation to their shares, although that mode of dealing is contrary to the regulations of their deed of management. I hope that we shall have no other cases before us, where the defence of a company rests upon the want of power to make a contract which the directors deliberately entered into, and under which they took a benefit, or upon the irregularities of their own proceedings."

POINT SECOND. The premium notes of this company constitute its capital stock, and, as such, are liable to pay all the losses and liabilities thereof.

It is stated in the plea "that there are no assets to pay

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*Union Insurance Company v. Hoge.*

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the losses of said company, other than the premium notes; and that the avails of said premium notes will not pay the losses arising on the policies of insurance, which policies were founded on premium notes."

As there are no assets to pay the liabilities of this company, except the premium notes, and as the premium notes will not pay the premium-note-policy losses, the question is distinctly presented for the decision of this court: Are said premium notes the capital of the company, and, as such, liable to pay *pro rata* all its liabilities?

This question has been frequently determined in the courts of New York, in suits brought by the receivers of insolvent insurance companies.

The company under consideration is admitted in the plea to be insolvent.

By the 17th section of the act annexed to the plea, this corporation is subject to "all the provisions of the revised statutes in relation to corporations, so far as the same are applicable."

By 2 R. S. of N. Y., 469, 1st ed., sec. 69: "If there shall be any sum remaining due upon any share of stock subscribed in said corporation, the receiver shall immediately proceed and recover the same."

In the case of *Brown, receiver, v. Crooke & Fowks*, 4 Comst., 51, the defendants, after the giving of their notes, took out no policies, and resisted the payment, on the ground that there was no consideration; *held*, that the notes were valid, and that the receiver of the company, which had become insolvent, was entitled to collect the amount thereof, to be applied in the liquidation of losses and liabilities.

The Supreme Court and Court of Appeals of the State of New York have determined these premium notes to be the capital stock of the company.

In *Hyde, receiver, v. Beardsley*, the opinion of the Court was delivered by Shankland, presiding justice. He says: "The deposit notes of the members of these mutual insurance companies constitute the capital stock of these companies."

*Van Buren v. Chenango Co. Mut. Ins. Co.*, 12 Barbour's R., at page 676.

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*Union Insurance Company v. Hoge.*

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At page 674 of the case last cited, the court, by Mason, J., say: "It has been adjudged in the Supreme Court of Pennsylvania that the deposit or premium notes of these mutual insurance companies are to be regarded as the capital stock of their companies, and the same has been held by this court in several cases which have been before it in reference to this same company. This was so adjudged in the case of Hyde, receiver, *v. Beardsley*, and Hyde, receiver, *v. Marvin*, decided at the May general term, 1848. These cases have been followed by several adjudications since."

In the case of Hyde, receiver, *v. Sawyer*, decided in the Supreme Court of New York in the 6th district, the Court by Morehouse, J.:

"The following principles have heretofore been debated, and fully decided and settled by this court:

"*First.* That every person effecting insurance in a mutual company becomes thereby a member of the corporation, and continues such member, not only during the period he shall remain insured by the corporation, but until he has contributed his proportion of all losses and expenses which accrued during the term of his insurance, or until the surrender of his policy upon the payment of his portion of all losses and expenses to which he was at any time liable to contribute as a member."

"*Second.* That the premium notes of the members of the corporation, deposited with the treasurer upon effecting insurance, together with the per cent. immediately paid, constitutes the capital stock of the company, consecrated to the mutual security of the insured, and all persons with whom the company may contract liabilities; and that no corporator can withdraw the same, or any part thereof, from the corporation, so as to release himself from any existing or contingent liability to pay the whole or any proportionate share of his deposit note."

It has been decided in Pennsylvania that the deposit or premium notes of a mutual insurance company are a part of its capital. Such was the decision in *Rhinehart v. The Alleghany Co. Mut. Ins. Co.*, (1 Barr Penn., 859,) and the Court of Appeals of New York, in *Hyde, receiver, v. Lynde*, (4 Comst.,

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*Union Insurance Company v. Hoge.*

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391,) by Bronson, Ch. J.: "I agree with the Supreme Court, that the deposit or premium notes are to be regarded as capital for the security of those who may deal with the company."

As these premium notes are a security for all who may deal with these companies, and as this company, as appears by the pleadings, has issued more policies for a cash advance premium than for premium notes, and has received forty-three thousand dollars for said cash policies, and expended the same in payment of the general liabilities of said company, common justice and mutuality would seem to require that said premium notes be applied equally to pay all the just creditors of this company.

Finally, the cash-premium-policy creditors of these New York companies, many of whom reside in Missouri, Illinois, Ohio, Virginia, and Pennsylvania, and most of whom are non-residents of New York, and whose interest in this and other like companies to an amount of more than one million of dollars is to be determined by the decision of this case, invite the several members of this high court to an examination thereof.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the northern district of New York.

The suit was brought against the defendants on a policy of insurance against fire, in the sum of \$2,500, upon a paper-mill, machinery, and stock, of one R. K. Kounsler, of the State of Virginia, the property situate in that State. The defendants are incorporated under the laws of the State of New York, and the place of business at the village of Fort Plain, an interior town of that State. The policy and all interest under the same have been duly assigned to the plaintiff.

There is no question in the case upon the loss, or upon the preliminary proofs; the defence being placed exclusively upon a defect of authority in the defendants to issue the policy. The act of the Legislature of New York, passed April 10, 1849, under which they were incorporated, provided, section 1, that any number of persons, not less than thirteen, might associate and form an incorporated company, among other things to



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*Union Insurance Company v. Hoge.*

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make insurance on dwellings, houses, &c., against loss or damage by fire; section 3, that these persons should file in the office of the Secretary of the State a declaration, signed by them, expressing their intention to form a company for transacting the business of insurance, which declaration should comprise a copy of the charter proposed to be adopted by them, and requiring notice of their intention to be published in a newspaper a given number of weeks. Section 4 provides for opening books of subscription to the capital stock, and that in case the business of the company was to be conducted on the plan of mutual insurance, then to open books to receive propositions and enter into agreements in the manner afterwards specified; which in substance is, that the company shall not commence business until agreements shall have been entered into for insurance, the premiums on which shall amount to one hundred thousand dollars, and notes have been received in advance for the premiums on such risks, payable at the end of or within twelve months from date, which notes shall be considered a part of the capital stock, and shall be deemed valid, negotiable, and collectable, for the purpose of paying losses or otherwise. Section 11, that the charter of the company should be examined by the Attorney General of the State, and if found in accordance with the requirements of the act, and not inconsistent with the Constitution or laws of the State, he should certify the same to the Comptroller of the State; and thereupon the Comptroller should institute an examination to ascertain if the company had received, and had in its actual possession, the capital, premiums, &c., to the full extent required by the act; and upon a certificate to this effect by the Comptroller, filed in the office of the Secretary of State, this officer should furnish the company with a certified copy of the charter and certificates, which, upon being filed in the office of the clerk of the county in which the company is located, shall be its authority to commence business and issue policies.

By section 10 it is made the duty of the corporators to declare in the charter the mode and manner in which the corporate powers conferred by the general act are to be exercised; and by section 12 the corporators, trustees, or directors, as the case

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*Union Insurance Company v. Hoge.*

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may be, shall have power to make such by-laws, not inconsistent with the Constitution or laws of the State, as may be deemed necessary for the government of its officers and the conduct of its affairs.

By the fifth section of the charter formed under this general act, it is provided that the rights, powers, &c., conferred by law on the company, shall be vested in and exercised by a board of directors, to consist of thirteen persons, to be elected by persons holding the policies of insurance in the company or their proxies, and one vote shall be allowed on every one hundred dollars insured. The eighth section of the charter provides that the rates of insurance shall be fixed and regulated by the company; and premium notes therefor shall be received from the insured, and shall be paid at such time or times and in such sum or sums as the company shall from time to time require; and any person applying for insurance, so electing, may pay a *cash premium*, in addition to a premium note, or a *definite sum in money*, to be fixed by the company, in full of said insurance and in lieu of a premium note.

The policy in question was issued on the payment of a cash premium, under this eighth section of the charter, the insured paying a gross sum of fifty-six dollars and twenty-five cents for the insurance of his paper-mill and stock to the amount of \$2,500 for one year.

The ground taken in the defence is, that, according to the general act under which the defendants were organized, they were empowered to make contracts and issue policies of insurance to such persons only as became members of the company by giving premium notes; and that the eighth section of the charter, providing for the payment of the premium in cash, was without authority, and the policy therefore void.

It is stated in the plea upon which the question in the case is raised, that from the time the company began business (August, 1850) till June, 1853, when it became insolvent, over two thousand policies were issued, founded upon premium notes, and over two thousand five hundred founded upon cash premiums; and that the amount of forty-three thousand dollars was received by the company for policies issued upon cash premiums.

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*Union Insurance Company v. Hoge.*

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The general act, conferring the power upon companies organized under it to make contracts of insurance against fire and issue policies, provides for a certain amount of capital, (\$100,000,) secured by premium notes upon engagements of insurance entered into by the companies, as a condition to the right of commencing the business of insurance. This capital, thus obtained, is essential to a complete organization under the act; for, without it, the corporation is forbidden to enter upon the business of insurance.

These preliminary engagements and the giving of premium notes were designed as an immediate security to persons who, confiding in the responsibility of the company, should make application for insurance on its going into operation.

The notes thus constituting capital are to be made payable at or within a year from their date; they may be made payable, therefore, within the terms of the act, on demand, or at any short period; and they are made negotiable and collectable for the payment of any losses which may accrue in the business of insurance or otherwise. And it has been held in the Court of Appeals, in New York, that they are collectable by the company, irrespective of losses, or assessments to pay losses. (16 New York R., 310; 2 Smith R.)

Now, although the general act provides for premium notes upon these preliminary engagements of insurance to be consummated on the organization of the company, and with a view to capital upon which to begin the business of insurance, there is no provision to be found in it prescribing the mode or manner in which premiums shall be paid or secured after the company has become organized and commenced operations. That seems to have been left to be regulated in the charter formed under the act.

The provision prescribing the giving of notes in advance for premiums, with a view to create capital, has no necessary relation to the subject of premiums to be received by the company after its organization, and in the course of conducting its ordinary business. The act had in view a different object in requiring the giving these notes, and provided specially for their disposition and use with reference thereto. They

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*Union Insurance Company v. Hoge.*

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are made a part of the capital stock of the company, and negotiable and collectable for the payment of losses or otherwise, and, as we have seen, collectable as such capital, irrespective of loss or assessment for losses; and as they may be made payable on demand, or at a short day, are convertible into money, according to the decision in the Court of Appeals of New York, immediately on the company's becoming organized and ready for business.

Even if this provision could be regarded as bearing upon the subject of premiums after the organization of the company, it would furnish but feeble support to the argument against cash premiums, the difference being simply between cash and a note payable and collectable immediately. According to the act, and construction given to it in the case referred to, these notes have no necessary existence after the organization of the company. They may then be converted into money. They seem to have been made necessary under this system of insurance while the company was in the process of organization, by way of furnishing the incipient amount of capital required by the act.

It is argued, however, that the company in question is a mutual insurance company, as declared by the act; that, according to this system, the insured must be a member of it, and that a person insured upon a cash premium, without any further liability, cannot be a member. This argument is not well founded, either upon principle or authority. Admitting that the insured must be a member of the company, he is made so by the payment of the cash premium. The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property constitute a common fund, devoted to the payment of any losses that may occur. Now, the cash premium may as well represent the insured in the common fund as the premium note; and this class of companies has been so long engaged in the business of insurance, it may well be that they can determine, with sufficient certainty for all practical purposes, the just difference in the rates of premium between cash and notes. These mutual companies, possessing the authority contained in the eighth section

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*Union Insurance Company v. Hoge.*

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of this charter, namely, to take cash premiums or premium notes, are, at the present day, in operation in several of the States, and it has never been supposed that the mutual principle has been thereby abrogated.

3 Ohio R., 348, N. S.

It has also been argued, that inasmuch as the defendants have been organized upon the principle of a mutual insurance company, its business must be conducted, as it respects the premiums to be received, according to the plan of mutual companies previously chartered in the State of New York. If the previous companies were required by their charters to receive premium notes, and not cash, then this requirement distinguishes them from the one before us. If their charters contained no such provision, then they were left, like the present one, to regulate the mode of payment at discretion. Besides, mutual companies upon both plans had been chartered by the Legislature of New York previous to the act of 1849, and hence no inference can be drawn, as it respects the charters of previous companies, from the unexpressed intent of the Legislature in this act, if otherwise admissible.

The true answer, however, to this argument, we think, is, that in the absence of any reference to previous charters, by which the provisions of the same might have been incorporated in the present one, the court must look to the law itself for the purpose of expounding its provisions and ascertaining the intent of the Legislature.

The general act prescribed the outlines of the system, and all the conditions and guards that were deemed essential to the security of persons applying for insurance, leaving the details and interior regulations to be arranged and determined by the company in their charter. Large powers were conferred, in general terms, as in the 10th section, "to declare in the charters" "the mode and manner in which the corporate powers given under and by virtue of this act are to be exercised;" and again, in the 12th section, the company "shall have power to make such by-laws" "as may be deemed necessary for the government of its officers and the conduct of its affairs." And, besides these general powers, inasmuch as the company

*Leggett et al. v. Humphreys.*

is incorporated for the express purpose of insurance of property against fire, in the absence of any prescribed mode of payment of premiums, the power to prescribe it by the company is necessarily implied; otherwise, the object for which it was created would be defeated.

This question has been indirectly before several of the courts of New York, and in all of them, so far as any opinion has been expressed, as I understand, it has been in favor of the validity of these policies.

The practical construction of this act of 1849 by the public officers of the State, including the Attorney General, who were required to supervise the preliminary steps made necessary to the organization of the company, and to certify that it had conformed to the provisions of the act, and the latter officers especially, that the charter was in accordance with it, is deserving of consideration. Under the construction thus given, numerous companies have been organized with charters like the present, providing for cash premiums, or premium notes, at the election of the insured, and an extensive business of insurance carried on in New York and several of the sister states; and, although this practical construction cannot be admitted as controlling, it is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt, or where the error is not plain.

The judgment of the court below is affirmed.

Mr. Justice DANIEL dissents, on the ground of want of jurisdiction.

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THOMAS LEGGETT, JUNIOR, SAMUEL SMITH, AND SMITH LAWRENCE, APPELLANTS, *v.* BENJAMIN G. HUMPHREYS.

There was a suit brought in the Circuit Court of the United States for the southern district of Mississippi, against a sheriff and his sureties upon the sheriff's official bond, in which judgment was given for the defendant. Being brought to this court by writ of error, the judgment was reversed, and a mandate went down, directing the Circuit Court to enter judgment for the plaintiffs. (See 2 Howard, 28.)

Whilst the suit was pending in this court, judgment against the sheriff and his sureties was given in a State court, and execution was issued against one of

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*Leggett et al. v. Humphreys.*

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the sureties, by means of which his property was sold and the amount of the penalty of the bond collected and paid over.

When the mandate of this court went down, the Circuit Court entered judgment against the surety, who filed his bill in equity for relief. This suit also was brought up to this court, who decided that the complainant was entitled to relief. (See 9 Howard, 297.)

Further proceedings in this case render it necessary for this court now to decide—

1. That the obligation of the surety is *strictissimi juris*, and he cannot be called upon to pay more than the penalty of his bond.
2. That as he was not permitted to plead *puis darrein continuance*, the satisfaction of the penalty of his bond, &c., he is entitled to relief in equity.
3. That the obligor in a bond has a right to convey property for the purpose of indemnifying his surety, provided it be done *bona fide*, and there is no lien upon the property of the obligor.

THIS was an appeal from the Circuit Court of the United States for the southern district of Mississippi.

In some of its connections it had twice before been before this court, (as reported in 2 Howard, 28, and 9 Howard, 297.)

The history of the case is given in the opinion of the court, and need not be repeated.

It was argued by *Mr. Bradley* and *Mr. Johnson* for the appellants, and by *Mr. Carlisle*, upon a brief filed by *Mr. Badger* and *Mr. Carlisle*, for the defendant.

The principal point upon which the decision of the court turned was the following, as stated by the counsel for the appellants:

Can the aid of a court of equity be had to protect a surety from payment of the penalty of an official bond, on the ground that he has once paid the full amount, when, before payment by the surety, the principal had placed in his hands money or property exceeding the amount of the penalty?

In other words, would not the surety wrongfully escape in this case, if it clearly appears that the payment he seeks to set up was made, or, which is the same thing, reimbursed to him out of the property of the sheriff?

The counsel for the appellants contended that a payment by the surety under such circumstances would not exonerate him, because the object of the bond was to afford a security addi-

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*Leggett et al. v. Humphreys.*

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tional to the property of the sheriff. The very property conveyed to indemnify the surety would have been primarily liable for the safety of judgment creditors, who would have had the responsibility of the surety as additional security; and, moreover, a larger amount of property has been conveyed than was sufficient to indemnify the surety.

With regard to this point, the counsel for the appellee observed:

A principal is bound fully to indemnify his surety against all loss resulting from his suretyship, including therein all reasonable expenses to which he may have been put.

*Heyden v. Cabot*, 17 Mass., 172.

A surety, as such, is deemed a creditor in equity, and, both at law and in equity, an assignment for his indemnity is valid, though the liability be future and contingent.

*Williams v. Washington*, 1 Dev. Eq. R., 137.

*Stevens v. Bell*, 6 Mass., 339.

*Hendricks v. Robinson*, 2 Johns. Ch. R., 288, 306.

*Halsey v. Fairbanks*, 4 Mason, 207.

*Miller v. Howry*, 3 Pen. and W., 374.

Consequently, the appellee cannot be bound to pay to other creditors of Bland moneys received by him of Bland for his own indemnity, and necessary for and applied to such indemnity.

But if the appellee had, of the funds assigned to him by Bland, a surplus, after fully indemnifying himself, upon what principle can the appellant charge the appellee with such surplus in this suit, or in any way use it to repel his equity?

Such a surplus would belong to Bland or his representatives, both as a resulting trust and by the express provision of the conveyance; for it the appellee would stand accountable to him or them. Could he discharge himself by paying it to the appellants? Would such payment be an answer to a suit by Bland or his representatives? These questions, it is conceived, must be answered in the negative. But to charge the appellee with the payment of the judgment at law, or any part of it, because he had moneys in his hands belonging to Bland, would be exactly equivalent to compelling him to pay these



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*Leggett et al. v. Humphreys.*

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moneys to the appellant, at the same time leaving him responsible to Bland or his representatives therefor.

It is true, if the appellants were judgment creditors of Bland, they might by some proper proceeding attach such surplus in the hands of the appellees, (4 John. Ch., 670, 687,) but surely not in this suit, and even in such proceeding Bland or his representative would seem to be a necessary party.

*But the appellants are not in any way creditors of Bland.* In the action at law, final judgment was rendered in the Circuit Court for Bland against the appellants, and that judgment is in full force, the writ of error having been abated as to him.

Wherefore it is conceived, that even if there were funds in the hands of the appellee, after indemnifying him, that fact would not affect, in whole or in part, his right to relief against the judgment.

Mr. Justice DANIEL delivered the opinion of the court.

The controversy between these parties, although in its progress it has been much complicated and involved, yet, as to the principle by which its true character is defined, and by which its decision should be controlled, is simple enough. That principle is the extent of the pecuniary responsibility sustained by the surety in an official bond for the conduct of his principal.

To a correct comprehension of the position of the parties to this cause, some length of detail as to the facts and pleadings it contains, is necessary.

The appellee, together with one Grissom, having in the year 1837 bound himself in the penalty of \$15,000, as surety to the official bond of Richard J. Bland, sheriff of Claiborne county, in the State of Mississippi, a suit was instituted in the name of the Governor of the State upon that bond, for the use of the appellants, in the Circuit Court of the United States for the southern district of Mississippi, charging a breach of the condition of that bond by Bland, in having released from jail one McNider, against whom the appellants had recovered a judgment in the Circuit Court aforesaid, and whom, after being charged in execution in that court, the marshal had committed

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*Leggett et al. v. Humphreys.*

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to the custody of Bland, the sheriff. Under certain provisions of the statutes of Mississippi, it was pleaded in defence to this action, that McNider being insolvent and unable to pay his prison fees, the appellants, who were non-residents, had failed to pay those fees, or, as required by the law of the State, to give security for their payment, or to appoint an agent within the county on whom demand for the prison fees could be made; and that, in consequence of such failure, McNider had, by a regular judicial order, been discharged from jail as an insolvent debtor. Upon a demurrer to the plaintiff's replications to these pleas, the Circuit Court gave judgment with costs in favor of the sheriff and the appellee, Humphreys, the suit having been previously discontinued as to the other surety, Grisom. This judgment was upon a writ of error reversed by this court, and the cause was remanded to the Circuit Court with instructions (Bland, the sheriff, pending the cause here, having died) to enter a judgment against the appellee, as surety, for the sum of \$3,910.78, besides the costs. (Vid. *McNutt v. Bland et al.*, 2 Howard, 28.) In the interval between the emanation of the writ of error and the reversal of the judgment of the Circuit Court, two judgments were, on motion, obtained in the State court against the sheriff and Humphreys as his surety, by the Planters' Bank of Mississippi, one for the sum of \$12,325.22, and the other for \$2,674.75, making an aggregate amount exceeding the penalty of the bond in which the appellee was surety; and the property of that surety was levied upon and sold under execution, and the proceeds applied in full satisfaction of the amount of the penalty. Upon the receipt in the Circuit Court of the mandate of this court, the appellee as surety as aforesaid, moved the Circuit Court for leave to plead *puis darrein continuance*, the judgments, levy, and satisfaction above mentioned, in fulfilment of his bond and of his liability for the sheriff; but the Circuit Court refused leave to plead these facts in discharge or satisfaction of the penalty, and, in literal obedience to the mandate of this court, rendered judgment against the appellee, as surety for the sum hereinbefore mentioned. The appellee, Humphreys, then exhibited his bill on the equity side of the Circuit Court, alleging the foregoing

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*Leggett et al. v. Humphreys.*

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facts, and averring, moreover, that no notice or process of any kind had ever been served upon him in the suit of McNutt v. Bland et al., but that the return of the officer of service as to the appellee was absolutely false. Upon these allegations, an injunction to the judgment at law was granted by the Circuit Court, but subsequently, upon a demurrer to the bill by the appellants, the injunction was dissolved and the bill dismissed. From this decree of dismissal an appeal was taken to this court, who, after a hearing, expressed the following conclusions, viz:

“In the case before us, the surety had been compelled to pay the whole amount of his bond by process from the State courts before the present defendants obtained their judgment against him, but after the institution of their suit. This would have been a good defence to the action, if pleaded *puis darrein continuance*. The complainant tendered his plea at the proper time, and was refused the benefit of it, not because it was adjudged insufficient as a defence, but because the court considered they had no discretion to allow it. The mandate from this court was probably made without reference to the possible consequences which might flow from it. At all events, it operated unjustly by precluding the plaintiff from an opportunity of making a just and legal defence to the action. The payment was made whilst the cause was pending here. The party was guilty of no *laches*, but lost the benefit of his defence by an accident over which he had no control. He is therefore in the same condition as if the defence had arisen after judgment, which would entitle him to relief by *audita querela*, or bill in equity. We are therefore of the opinion that the complainant was entitled to the relief prayed for in the bill, and that the decree of the court below should be reversed.”

The cause was thereupon remanded to the Circuit Court for further proceedings to be had therein, in conformity with the above opinion. (Vid. 9 How., 313, 314, *Humphreys v. Leggett et al.*) On the filing of the mandate in this latter case, the defendants (the present appellants) being ruled by the Circuit Court to answer the bill for the injunction, admit by their answer the recovery of their judgment against Humphreys as

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*Leggett et al. v. Humphreys.*

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surety for Bland. They acknowledge their belief of the judgments in the State court against the sheriff and his surety, and the levy under those judgments, and the return of satisfaction upon the executions by the proper officer, but allege that the judgments were fraudulently suffered in order to defeat the appellants; that no money was paid under the pretended sale, and that the property was retained by Humphreys. In an amended answer, filed by leave of the court, the appellants allege that Bland, the sheriff, had transferred the judgments in the State court, for \$10,524, to Humphreys, who, under that assignment, had received the sum of \$18,000; that he had not discharged the penalty of the sheriff's bond, and from various sources had received funds exceeding all his liabilities arising therefrom. Subsequently, viz: in 1851, the appellants, by a cross bill against the appellee, charged that Bland, to indemnify the appellee as surety in the bond of 1837, had assigned certain debts and other subjects of property, real and personal, to an amount more than equal to the penalty of that bond, that among these subjects were the fee bills due to Bland, as sheriff, to a large amount, and also the judgments set forth in the original bill as having been recovered in the State courts; and that these judgments had been discharged by Humphreys by notes purchased by him at the depreciation of fifty cents in the dollar. To this cross bill a demurrer was interposed by Humphreys, but, upon being ruled by the court to answer, he admitted that in March, 1840, Bland conveyed, in a deed of that date, to Volney Stamps, the property mentioned in that deed, in trust to indemnify the appellee as surety in the official bond of Bland, of November, 1837, and to indemnify the same appellee and one Flowers, as sureties for Bland on his official bond of 1839, and to save them harmless against *all loss and damage, and all money paid, or charge or expense to be incurred*, in consequence of being sureties in the said official bonds. He admits that so much of the property as could be found has been sold by the trustee, and that from the proceeds of sale, after deducting the expenses of sale, respondent has received three-fourths, amounting to \$3,825, and the said Flowers one-fourth, amounting to \$1,275, which make the whole amount that has

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*Leggett et al. v. Humphreys.*

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been realized from the trust fund. He admits that in 1840, for his further indemnity, Bland assigned to him all the fees then due to the former as sheriff of Claiborne county, but alleges that from this source there has been received an aggregate amount of only \$3,288.17, as shown by the statements of the persons employed in the collection of those fees, filed as exhibits with the answer. The respondent further admits, that after the recovery by the Planters' Bank of the \$12,325.22 against said Bland and respondent, which recovery was founded on an original judgment of the said bank against P. Hoopes, J. H. Moore, and John M. Carpenter, the said Bland claiming to be the owner of that judgment, did assign all his rights and interests therein to respondent, for his indemnity, as he had to pay the penalty of the bond.

The respondent claims the benefit of that judgment, but alleges that he has collected nothing under it from either Hoopes or Moore, each of whom became insolvent prior to 1840, and still continued insolvent. That the judgment of the Planters' Bank against Campbell Pierson and Moore, for \$3,702.66, had always been unproductive and worthless, and that nothing had been or would be received therefrom, by reason of the insolvency of the defendants in that judgment. That in a suit pending in the Superior Court of Chancery of the State of Mississippi, upon a creditor's bill, the respondent has exhibited the former judgment of the Planters' Bank for \$10,855.98, as a claim against the estate of H. Carpenter & Co., and the commissioner has reported it as a valid claim for that amount, with interest thereon from November 1st, 1840. That this report having been excepted to, and remaining still a subject of contest, the Court of Chancery had in the mean time, out of the funds of the estate, ordered the payment to the appellee of the amount of the said judgment or claim for \$10,855.98 with interest, amounting in the whole to \$18,852.75, upon his entering into bond with security to refund that amount in the event that it should be disallowed by the court. With this answer denying his having been indemnified, were exhibited as parts thereof, the deed of trust from Bland, the amount of fees collected under the assignment from Bland, and

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*Leggett et al. v. Humphreys.*

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a statement of the account between Bland and Humphreys. With the original bill of Humphreys were exhibited also, the bonds in which he was bound as surety, the records of the judgments on motion against the sheriff and Humphreys; and by the deposition of Maury, the attorney for the Planters' Bank, was proved the satisfaction of those judgments by sales of the property of Humphreys under execution. At the May term of the Circuit Court, in the year 1856, this cause having been submitted to the court upon the original bill, the answer and replication, and the exhibits and proofs, and upon the cross bill and the answer thereto, and upon the exhibits therewith, the following decree was then made: "It is ordered, adjudged, and decreed, that the injunction heretofore granted in this cause be made perpetual, and that the defendants, Leggett Smith and Lawrence, and their agents and attorneys, be and they are hereby forever enjoined and restrained from taking out any execution upon a certain judgment rendered on the law side of this court, on the 14th day of May, 1845, in favor of Alexander McNutt, Governor, suing for the use of Leggett Smith and Lawrence, against the said Humphreys, the complainant, for the sum of \$6,855.38, being the judgment mentioned in the bill of complaint in this cause, and that they be forever enjoined and restrained from taking or adopting any step or proceeding to enforce the payment of the said judgment by the complainant Humphreys, or the collection thereof out of his estate. And it is further adjudged and decreed, that the said complainant do recover of the said defendants his costs of suit to be taxed." This decree having been brought by appeal before the court, its legality and justice are now the subjects for our examination.

With reference to the defence essayed by the defendant in the suit of McNutt *v.* Bland, after the filing of the mandate of this court in that cause, the opinion of this court in the case of Humphreys *v.* Leggett et al. would seem to be conclusive, both as to the period at which the defence was proffered, and the legitimacy and sufficiency of the defence, if substantiated by proof. The facts tendered in defence coming into existence after the issues previously made up, were not on that ac-

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*Leggett et al. v. Humphreys.*

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count less essentially connected with the character of the controversy, nor could the defendant for that reason have been justly deprived of their influence upon that controversy. He appears to have sought to avail himself of the earliest and only opportunity for alleging them by plea *puis darrein continuance*. In support of his right so to plead, it would be adding nothing to the clearly-expressed opinion of this court in the 9th of Howard, to refer to cases collated in elementary treatises on pleading.

In judging of the character or sufficiency of the defence alleged for the exemption of the appellee, there should be taken as a guide the rule, which is perhaps without an exception, that sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations. This rule is thus forcibly put by Chancellor Kent in the 3d Commentaries, p. 124, where he says: "When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle is well settled, that the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication." It will be seen that, to a certain extent, even the creditor whose claim the surety has under the terms of his obligation been compelled to satisfy, may be required to co-operate in effecting the indemnity of the latter. Thus it is said, on the same page of the work just quoted, that "the claim against a surety is *strictissimi juris*; and it is a well-settled principle, that a surety who pays the debt of his principal, will in a clear case in equity be substituted in the place of the creditor to all the liens held by him to secure the payment of his debt; and the creditor is bound to preserve them unimpaired when he intends to look to the surety." For this doctrine are cited numerous English and American authorities.

In the case of *Graves v. McCall*, (1 Wash. Rep., 364,) it is said by the Court of Appeals of Virginia, "that a court of equity will not charge a surety farther than he is bound at law; but if a surety bound at law cannot be charged there for

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*Leggett et al. v. Humphreys.*

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the want of the instrument of which the creditor is deprived by accident or fraud, a court of equity will restore the paper to its *legal* force.

In the case of the *United States v. White et al.*, (1 Wash. Cir. Ct. Rep., 417,) it is ruled by Washington, Justice, "that a surety can never be bound beyond the scope of his engagement, and therefore a surety for the faithful service of B as clerk to C, who afterwards enters into partnership with D, is not liable for unfaithful conduct to C and D." The same law has been explicitly and repeatedly ruled by this court, as will be seen in the cases of *Miller v. Stewart*, (9 Wheat., 680;) of *McGill v. The Bank of the United States*, (12 Wheat., 511;) and the *United States v. Boyd et al.*, (15 Pet., 187.)

The principle which limits the liability of the surety by the penalty of his bond, inheres intrinsically in the character of his engagement. He does not undertake to perform the acts or duties stipulated by his principal, and would not be permitted to control their performance; and *could not*, where his principal was a public officer, legally assume the functions of that principal. The undertaking of the surety is essentially a pledge to make good the misfeasance or non-feasance of his principal to an amount co-extensive with the penalty of his bond. In addition to this interpretation resulting from the character of the obligation of the surety, the statute of Mississippi, which necessarily enters into and controls all contracts made under its authority, expressly limits the responsibility of a surety in a sheriff's bond to the amount of the penalty of that bond. (Vide *Hut. Miss. Co.*, p. 441, art. 3, sec. 1.) Indeed, it has scarcely been contested in argument in this case, that the extent of the surety's liability upon the sheriff's bond was measured by the amount of the penalty. The great effort of counsel has been to show in this case that satisfaction of the penalty of the bond has not been honestly made, but has been fraudulently evaded.

1. By the provisions of the deed of trust for the indemnity of the appellee, and in the application of the property thereby conveyed, and by the subsequent assignment of fees to a large amount, exceeding together in value the judgments of the *Planters' Bank* against the sheriff and his surety.



2. By the sale of the property of the appellee under the executions in behalf of the Planters' Bank at a sacrifice greatly below its value.

The force of these positions will now be considered.

Whilst it may be conceded that a fraudulent combination between the officer and his surety, for the purpose of shielding the property of both or either from just responsibility, and in contemplation of delinquency in the former, would have the effect of vitiating any compact or instrument made with such a design, it is undeniable that an open and honest effort of a principal to protect his surety against casualties incident to a responsibility about to be assumed for him, cannot be obnoxious to objection; and it is equally clear, that the simple fact of the existence of such an effort, unattended by any known *indiciu*m of fraud, and unassailed by plain or probable direct proofs, can warrant no just impeachment of such an effort, which may be praiseworthy and just with reference to its object, and calculated to promote the performance of services to the public which otherwise could not be undertaken. The practice of providing such an indemnity for sureties is known to be usual and frequent, and it would be difficult to imagine an objection, either legal or moral, to its application to the extent to which the surety had been made answerable upon his bond. The right of a debtor in the first instance to apply his payments wherever his funds are not specifically bound, is universally admitted. The judgment of the Circuit Court in the case of McNutt *v.* Bland having been against the plaintiff, and the deed by Bland for the indemnity of the appellee having been executed for a *bona fide* consideration pending the proceedings on the writ of error to the Circuit Court, and no final judgment of that court having been entered to this day, there was no specific lien on the property of Bland which prevented its appropriation in exoneration of his surety, or which forbade any payments or assignments by him in discharge of his liability. A strong illustration of this position may be seen in the case of the United States *v.* Cochran, decided by Marshall, Chief Justice, and reported in the 2d vol. of Brockenbrough's Reports, p. 274. It is one of that class in which priority is

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*Leggett et al. v. Humphreys.*

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claimed for the United States in instances of insolvency of their debtors. It is thus stated by the judge:

“Robert Cochran, collector at the port of Wilmington, N. C., being very largely indebted to the United States, made a deed of his property for their benefit. Previous to the execution of this deed he deposited \$10,000, the amount of the bond executed to the United States for the faithful performance of his duty, in a trunk, which was placed in the bank, and absconded. From Baltimore he addressed a letter to his sureties, requesting the trunk to be taken out, and the money to be applied to their exoneration. The money was received at the Treasury, and the bond given up. It being afterwards discovered that this was the money of the collector, and not of the sureties, this suit is brought to compel the sureties to pay the amount of the bond, considering the money received as constituting no equitable discharge as to them. \* \* \*

The act of Congress does not transfer the property itself to the United States, but subjects it to their debts in the first instance. The assignee holds it as the debtor would hold it, liable to the claim of the United States, and if he converts it to his own use, or puts it out of the reach of the United States, he is undoubtedly responsible for its value. \* \* \* But the power of the debtor to apply his payments is co-extensive with that of the creditor. This principle has, it is believed, never been denied. If it be correct, then the power of Mr. Cochran to apply this sum of money in discharge of the bond, and in exoneration of the sureties to it, is co-extensive with that of the United States to make the same application of it. If then Mr. Cochran had without any assignment of his property paid this money into the Treasury, with a direction that it should be applied to the bond, he would have exercised a right which the law gives to every debtor. \* \* \* Does the transfer of this money to the sureties change the law of the case? We think not. It has been very properly argued that the act of Congress gives to the debt due to the United States priority over debts due to individuals, but not to one part of the debt due to the United States over any other part of it; nor does it vest the property absolutely in the United States, though it

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*Leggett et al. v. Humphreys.*

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gives them the right to pursue it for the purpose of appropriating it in payment. It would seem to follow, that the right to apply payments whilst the money is in the hands of the debtors, is not affected by the act of Congress, but remains as it would stand independent of that act. If then the sureties had declared to the Treasury Department that the money was received from Mr. Cochran, to be paid in discharge of their bond, and had tendered it in payment thereof, we think the tender would have been valid, and might have been pleaded in a suit on the bond."

This was a case where there was a legal priority in the creditor, where there existed a *quasi* lien, or a restriction upon the power of the debtor to dispose of his property, so as to exempt it or its value from the claim of the creditor. In the case under consideration, no such restriction existed; no lien by judgment or other specific claim upon the property conveyed in trust to Stamps; and no evidence having been adduced of a fraudulent purpose in making that conveyance, no valid objection is perceived to an application of the proceeds of that conveyance towards the indemnity of the surety; and these proceeds, together with the amount of the sheriff's fee bills collected, it is shown by the testimony, are far short of the penalty of the bond discharged by the surety.

The right to any surplus which, upon a settlement between the appellee and Bland or his representatives, may remain in the hands of the former, we regard as not involved in nor pertinent to this controversy, which relates regularly and exclusively to the question whether the appellee, as the surety for Bland, has fulfilled the exigency of his bond by a satisfaction of the penalty.

In answer to the objection which has been urged, and founded on the alleged sacrifice of the property of the appellee in the sale under the judgments of the Planters' Bank, it may be remarked, that the relevancy or force of such an objection is not perceived. The questions here are these, and these only, viz: whether the penalty of the bond executed by the appellee has been satisfied, or whether there remains still a portion of that penalty of which the appellants can claim the benefit?

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*Richmond v. City of Milwaukee.*

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The judgments in favor of the bank, the levy upon the property of the appellee, the sale and satisfaction to the full amount of the penalty, are facts all established of record. Whatever sacrifice of the property of the appellee by these undoubted proceedings may have been produced, is his loss, and his only, and can in no wise affect the validity of his release by the fulfilment of his obligation.

The decree of the Circuit Court is therefore affirmed, with costs.

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DEAN RICHMOND, APPELLANT, v. THE CITY OF MILWAUKIE AND  
FERDINAND KUEHN.

There being no special provision in the act of Congress regulating appeals from the District Court of the United States in Wisconsin, they are governed by the general law of 1803.

By that act, no appeal will lie unless the sum or value in controversy exceeds two thousand dollars.

THIS was an appeal from the District Court of the United States for the district of Wisconsin.

The case is stated in the opinion of the court.

It was argued by *Mr. Brown* for the appellant, upon which side there was also a brief by *Brown and Ogden*, and by *Mr. Doolittle* for the appellee.

As the case went off upon a question of jurisdiction, the arguments and points of the counsel upon its merits are omitted.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an appeal from the District Court of the United States for the district of Wisconsin, exercising the powers of a Circuit Court.

It appears that a bill was filed in that court by the appellant, praying an injunction to prohibit the conveyance of certain lots in the city of Milwaukee, which had been sold for the payment of city taxes assessed upon it by the corporation.

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*Richmond v. City of Milwaukie.*

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The bill states that the city of Milwaukie is a corporation, chartered by the State; that, under its charter and the Constitution and laws of the State, it is authorized to assess certain taxes for corporate purposes upon the lots and property in the city, and, if the taxes are not paid according to law, to sell the lot upon which it is charged. The bill further sets forth, that the appellant was the owner of sundry lots in the city, which are particularly described by their respective numbers, and also the assessment imposed upon them, respectively, the manner and purposes for which it was imposed, and the proceedings of the corporate authorities under this assessment, and the sale of the lots to pay the amount claimed to be due.

And the bill then charges that the corporation exceeded its powers in imposing these taxes, and, even if lawfully imposed, that the proceedings afterwards had were not conformable to the law of the State, which points out particularly the steps to be taken before the lot assessed can be sold. The bill charges, that upon the grounds above stated, the sale of his lots was illegal and invalid, and prays an injunction to prevent a conveyance to the purchaser, as such a conveyance would be a cloud upon his title.

The bill alleges that the lots so sold are worth five hundred dollars, and that the taxes imposed exceed their value as assessed on the books of the corporation more than two hundred per cent.

The corporation and their treasurer answered, and admitted the sale of the lots, and aver that the city had a lawful right to impose the tax; that their proceedings to recover it were fully authorized by law, and that the sales were valid, and will entitle the purchasers to a conveyance unless the appellant shall within three years redeem them, in the manner and upon the terms provided for by the law of the State where lands or lots have been sold for the non-payment of taxes.

Testimony was taken on both sides, which is set out in the transcript. But in the view which the court take of the case it is unnecessary to state it particularly, or to set out at large the various points in controversy between the parties upon the bill and answer, because, upon the appellant's own showing, this court have no jurisdiction..

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*Rice v. Minnesota and Northwestern Railroad Company.*

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Appeals to this court from the Circuit Courts of the United States, and from District Courts exercising the jurisdiction of Circuit Courts, are regulated by the act of 1803, ch. 40, where not otherwise specially provided for by act of Congress. There is no special provision in the act establishing the District Court in Wisconsin which regulates appeals to this court, and consequently they are governed by the general law above referred to; and by that law no appeal will lie, unless the sum or value in controversy exceeds \$2,000, and that fact must be shown to the court in order to give jurisdiction in the appeal.

Now, the matter in dispute in this case is the title to the lots which have been sold by the municipal authorities for the non-payment of the taxes. The taxes assessed were charged upon the respective lots, and created no personal responsibility upon the owner, the lots alone being liable for the payment. And the only evidence or averment of their value is the statement of the complainant in his bill that they were worth more than five hundred dollars, and his complaint that more than two hundred per cent. upon their value as mentioned in the books of the corporation was charged upon them by the assessment, and the proceedings of the city authorities under it. There is nothing in the allegations of the parties or in the evidence to show that the value of the lots in question exceeded two thousand dollars, nor anything from which it can be inferred.

The appeal must therefore be dismissed for want of jurisdiction in this court.

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**EDMUND RICE, PLAINTIFF IN ERROR, v. THE MINNESOTA AND  
NORTHWESTERN RAILROAD COMPANY.**

Where a common-law case was dismissed at the last term for want of jurisdiction, (the record showing that no final judgment was given in the court below,) an affidavit setting forth that the final judgment was accidentally omitted from the record, and the production of a correct record, are not sufficient to sustain a motion to annul the order of dismissal, and reinstate the case upon the docket.

After the judgment of this court was passed upon the case, and the term was closed, the function of the writ of error was over, and it cannot now be revived. The distinction pointed out between a common-law case and a case in admiralty.

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*Rice v. Minnesota and Northwestern Railroad Company.*

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THIS was a case which was brought before this court from the Territory of Minnesota.

It was before the court at the preceding term, under the circumstances stated in the opinion of the court.

*Mr. Reverdy Johnson* now moved to revoke the mandate and annul the judgment of dismissal which was entered at the last term.

The motion was as follows:

"This cause was on the calendar of the last term, No. 109. It was then, after argument, dismissed for want of jurisdiction, upon the ground that the judgment below was not a final one, within the meaning of the act of Congress. A mandate was issued to that effect by the clerk of this court, in due course, but has not as yet been filed in the court below. Since the decision of this court, the clerk of the court below has transmitted to one of the counsel of the defendants in error an amended transcript, by which it appears, as the fact was, that the judgment below was a final one, and that the failure to have had it appear in the first transcript was the error of the clerk or his deputy, by whom that transcript was made up. Under these circumstances, the undersigned, as counsel for the defendants in error, moves the court to revoke the mandate and annul the judgment of dismissal of the last term, and order the case to stand on the calendar, as it would stand, at the present term, if such judgment had not been rendered, but the case had been continued. He makes this motion, because it is important to the interests of the defendants in error that the case be decided at the earliest moment upon its merits, and will, at the hearing of the motion, submit decisions of this court in maintenance of this motion.

"REVERDY JOHNSON,

*"Counsel for Defendants in Error."*

Mr. Chief Justice TANEY delivered the opinion of the court.

This case was brought up, by a writ of error, directed to the judges of the Supreme Court of the Territory of Minnesota, the writ being returnable to the last term of this court. The

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*Rice v. Minnesota and Northwestern Railroad Company.*

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case was docketed and called for trial according to the rules of the court; but, upon inspection of the transcript, it appeared that there was no final judgment in the court below, and the case was therefore dismissed for want of jurisdiction.

At a subsequent day in that term, a motion was made by the plaintiff in error for a *certiorari*, upon affidavits filed, suggesting that there had been a final judgment in the Territorial court, although it had not been correctly entered on the record. But the court were of opinion that the affidavits were not sufficient to support the motion, and refused the *certiorari*.

A motion has been made at the present term to annul the order of dismissal made at the last term, and to place the suit on the calendar in the same order in which it would have stood if it had not been dismissed, but continued over to the present term. And in support of this motion, a transcript from the Territorial court has again been presented; and this transcript contains a final judgment of the Supreme Court of the Territory. It is certified by the clerk of the District Court of the United States, to whose custody the record and proceedings in this case have been transferred, pursuant to an act of Congress; and this transcript, among other things, certifies that an amended order of the Supreme Court of the Territory, reversing the judgment of the inferior Territorial court, and ordering a judgment for defendants, and an amended judgment of the said court to the same effect was on file in his office, transferred with the other proceedings in the case from the Supreme Territorial Court.

But we think the motion to annul the judgment of the last term, and reinstate the case, cannot be granted. The suit is a common-law action for a trespass on real property, and the judgment of the court below can be brought here for revision by writ of error only. That writ was issued by the plaintiff in error, returnable to the last term of this court; and it brought the transcript before us at that term. It was judicially acted on, and decided by this court. And when the term closed, that decision was final so far as concerned the authority and jurisdiction of this court under that writ. The writ was *functus officio*; and if the parties desire to bring the record of



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*Kelsey et al. v. Forsyth.*

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the case again before this court, it must be done by another writ of error. The former writ is not returnable to the present term, and cannot therefore, according to the principles which govern this common-law writ, bring the record before us.

The case of the *Palmyra* (12 Wheat., 1) has been referred to, where a motion similar to the present was granted by the court. And if that had been a case at common law, we might have felt ourselves bound to follow it, as establishing the law of this court. But it was a case in admiralty, where the power and jurisdiction of an appellate court is much wider upon appeal, than in a case at common law. For, in an admiralty case, you may in this court amend the pleadings, and take new evidence, so as in effect to make it a different case from that decided by the court below. And the court might well, therefore, deal with the judgment and appeal of the inferior tribunal in the same spirit. But the powers which an appellate court may lawfully exercise in an admiralty proceeding, are altogether inadmissible in a common-law suit.

The case in 3 Pet., 431, relates to cases and questions of a different character from the one before us. In that case the judgment of the court at the preceding term was amended. But the amendment was made to correct a clerical error in this court, and make the judgment conform to that which the court intended to pronounce. But this is not a motion to amend, but to reverse and annul the judgment of the last term, which was passed upon full consideration, with the case regularly and legally before us, as brought up by the writ of error.

We refer to these two cases because they have been relied on in support of the motion. But, in the judgment of the court, they stand on very different principles; and the motion, for the reasons above stated, must be overruled.

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**JAMES KELSEY AND THOMAS P. HOTCHKISS, PLAINTIFFS IN ERROR, v. ROBERT FORSYTH.**

The agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a State, regulating the proceedings of its own

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*Kelsey et al. v. Forsyth.*

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courts, authorize a District or Circuit Court sitting in the State to depart from the modes of proceeding and rules prescribed by the acts of Congress.

Therefore, where the parties to an ejectment suit agreed to waive a trial by jury, and that both matters of law and of fact should be submitted to the decision of the court, and then a bill of exceptions was brought up to this court to all the rulings and decisions of the court below, this court cannot look into errors of fact or errors of law alleged to have been committed in such an irregular proceeding, and the judgment of the court below will be affirmed.

THIS case was brought up by writ of error from the Circuit Court of the United States for the northern district of Illinois.

It was an action of ejectment brought by Robert Forsyth, a citizen of Missouri, against Kelsey and Hotchkiss, to recover certain lots in the county of Peoria.

After some proceedings which it is not necessary to mention in this report, the cause came on for trial at December term, 1854, of the Circuit Court, when the parties filed the following agreement:

"And be it further remembered, that afterwards, to wit, upon the calling of this cause for trial, by the mutual agreement of the parties, and in accordance with the laws and practice of this State, a jury was waived, and both matters of law and fact were submitted to the court, upon the distinct understanding that the right of either party should be full and perfect to object to the admission of incompetent evidence, and the refusal to admit that which was competent; and with the same privilege of excepting to the rulings of the court in either case, as though the cause were tried by a jury; and with the right to either party to avail himself, in the Supreme Court, of any erroneous ruling in this court, precisely as though the cause had been submitted to a jury, and with liberty to either party, if it should be necessary to the hearing of this cause in the Supreme Court, to treat the evidence introduced in this cause in the nature of a special verdict."

The parties then proceeded to offer their evidence, consisting of deeds, records, &c., when the court found the issue in favor of the plaintiff, and gave judgment accordingly.

The bill of exceptions taken by the defendants recited all the evidence, and concluded thus:

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*Kelsey et al. v. Forsyth.*

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“And thereupon defendants move the court to set aside said judgment, and grant them a new trial, for the reason that said decision was against the evidence in the case, which motion the court overruled. To all of which findings, rulings, decisions, and opinions, defendants then and there excepted, and prayed that this their bill of exceptions might be sealed, signed, and made of record; which is done, &c.

“Exceptions allowed, January 24, 1855.

“THOMAS DRUMMOND. [SEAL.]”

The cause was argued in this court by *Mr. Ballance*, who assigned various errors, in the judgment of the court below, relative to the merits of the case, and others in the form of proceeding. Amongst the latter, it was alleged that it was error to try the cause without a jury; and, upon the authority of *Graham v. Bayne*, 18 Howard, 60, he contended that the cause must be remanded for a *venire de novo*.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the northern district of Illinois.

An action of ejectment was brought by the defendants in error against the plaintiff, for a certain parcel of land described in the declaration, and upon the trial the verdict and judgment were for the plaintiff; a motion was afterwards made to set aside the judgment and for a new trial, and the judgment was accordingly set aside, and a new trial granted upon the terms mentioned in the transcript. In the proceedings upon this new trial, the parties agreed to waive a trial by jury, and that both matters of law and of fact should be submitted to the decision of the court. The case was proceeded in according to this agreement, and the court, as the record states, found the issue in favor of the plaintiff, (Forsyth,) and entered judgment accordingly; and to this decision, and to all the rulings and decisions of the court in the previous stages of the cause, the defendants (Kelsey and Hotchkiss) excepted, and sued out a writ of error to bring the case before this court.

It will be seen from this statement that in a common-law

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*Winans v. New York and Erie Railroad Company.*

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action of ejectment the case was submitted to the court upon the evidence, without the intervention of a jury, leaving it to the court to decide the fact, as well as the law, upon the evidence and admissions before it. The case, therefore, is the same in principle with that of *Guild and others v. Frontin*, 18 How., 135. And the doctrine in that case was reaffirmed in *Suydam v. Williamson*, 20 How., 428, and the grounds upon which it rests fully set forth. It is unnecessary to repeat here what was stated in these two decisions. It is sufficient to say that the agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a State, regulating the proceedings of its own courts, authorize a district or Circuit Court sitting in the State to depart from the modes of proceeding and rules prescribed by the acts of Congress.

The judgment of the Circuit Court must therefore be affirmed.

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ROSS WINANS, PLAINTIFF IN ERROR, *v.* THE NEW YORK AND  
ERIE RAILROAD COMPANY.

Where objection was made, during the trial of a cause, to the reception of the deposition of a witness, which had been taken under a commission, it was properly overruled, because the rules of practice in the Circuit Court of New York give time and opportunity to move for a suppression of the deposition or a re-examination of the witness.

The paper which the witness referred to, but did not annex to his deposition, was not in his power.

In the trial of a suit for the violation of a patent right, the court cannot be compelled to receive the evidence of experts as to how a patent ought to be construed. The judge may obtain information from them, if he desire it.

Winans's patent for "a new and useful improvement in the construction of cars or carriages intended to travel upon railroads," was for the manner of arranging and connecting the eight wheels of a railroad carriage for the purpose of enabling burden and passenger cars to pursue a more smooth, even, and safe course over the curves and irregularities of a railroad. And it was proper to instruct the jury, that if they found, from the evidence, that before the time when Winans claimed to have made the discovery, carriages with eight wheels, arranged and connected substantially in the same manner and upon the same mechanical principles with those described in the patent, were known, and publicly used, Winans was not entitled to recover.

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*Winans v. New York and Erie Railroad Company.*

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THIS case was brought up by writ of error from the Circuit Court of the United States for the northern district of New York.

It was an action brought by Winans against the railroad company for a violation of his patent for a new and useful improvement in the construction of cars or carriages intended to travel upon railroads.

In order that the reader may understand the nature of the improvement, the description of it, as given by Winans himself, is here inserted, because it is remarkably clear and well drawn up.

The following is the schedule referred to in the letters patent:

"To all whom it may concern: Be it known, that I, Ross Winans, civil engineer, of the city of Baltimore, in the State of Maryland, have invented a new and useful improvement in the construction of cars or carriages intended to travel upon railroads; which improvement is particularly adapted to passenger cars, as will more fully appear by an exposition of the difficulties heretofore experienced in the running of such cars at high velocities, which exposition I think it best to give in this specification, for the purpose of exemplifying the more clearly the object of my said improvement.

"In the construction of all railroads in this country which extend to any considerable distance, it has been found necessary to admit of lateral curvatures, the radius of which is sometimes but a few hundred feet; and it becomes important, therefore, so to construct the cars as to enable them to overcome the difficulties presented by such curvatures, and to adapt them for running with the least friction practicable upon all parts of the road; the friction to which I now allude is that which arises from the contact between the flanches of the wheels and the rails, which, when it occurs, causes a great loss of power, and a rapid destruction of, or injury to, both the wheel and the rail, and is otherwise injurious. The high velocities attained by the improvements made in locomotive engines, and which are not only sanctioned, but demanded, by public opinion, render it necessary that certain points of construction and

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*Winans v. New York and Erie Railroad Company.*

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arrangement, both in the roads and wheels, which were not viewed as important at former rates of travelling, should now receive special attention. The greater momentum of the load, and the intensity of the shocks and concussions, which are unavoidable, even under the best constructions, are among those circumstances which must not be neglected, as the liability to accident is thereby not only greatly increased, but the consequences to be apprehended much more serious. The passenger and other cars in general use upon railroads have four wheels, the axles of which are placed from three and a half to five feet apart; this distance being governed by the nature of the road upon which they run, and other considerations. When the cars are so constructed that the axles retain their parallelism, and are at a considerable distance apart, there is a necessary tendency in the flanges of the wheels to come into contact with the rails, especially on the curvatures of least radius, as the axles then vary more from the direction of the radii. From this consideration, when taken alone, it would appear to be best to place the axles as near to each other as possible, thus causing them to approach more nearly to the direction of the radii of the curves, and the planes of the wheels to conform to the line of the rails. There are, however, other circumstances which must not be overlooked in their constructions. I have already alluded to the increased force of the shocks from obstructions at high velocities—and, whatever care may be taken, there will be inequalities in the rails and wheels, which, though small, are numerous, and the perpetual operation of which produces effects which cannot be disregarded. The greater the distance between the axles, while the length of the body remains the same, the less is the influence of these shocks or concussions; and this has led, in many instances, to the placing them in passenger cars, at or near their extreme ends. Now, however, a compromise is most commonly made between the evils resulting from a considerable separation and a near approach, as, by the modes of construction now in use, one of the advantages must be sacrificed to the other. But it is not to the lateral curvatures and inequalities of the road alone that the foregoing remarks ap

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*Winans v. New York and Erie Railroad Company.*

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ply. The incessant vibration felt in travelling over a railroad is mainly dependent upon the vertical motion of the cars in surmounting those numerous though minute obstructions which unavoidably exist. The nearer the axles are placed to each other, the greater is the effect of this motion upon the passengers, and the greater its power to derange the machinery and the road. It becomes very important, therefore, both as regards comfort, safety, and economy, to devise a mode of combining the advantages derived from placing the axles at a considerable distance apart, with those of allowing them to be situated near to each other. It has been attempted, and with some success, to correct the tendency of the flanches to come into contact with the rails, on curved and other parts of the road, by making the tread of the wheel conical; and if the travelling upon railroads was not required to be very rapid, this would so far prove an effectual corrective, as the two rails would find diameters upon the wheels which would correspond with the difference in length, the constant tendency to deviation being as constantly counteracted by this construction; but at high velocities, the momentum of the body in motion tends so powerfully to carry it in a right line, as to cause the wheel on the longer rail to ascend considerably above that part of the cone which corresponds therewith. The consequence of this is, a continued serpentine motion, principally, but not entirely, in a lateral direction; nor is this confined to the curved parts of the road, but it exists to an equal or greater extent upon those which are straight, especially when the axles are near to each other, the irregularities before spoken of constantly changing the direct course of the wheels, whilst there is no general curvature of the rails to counteract it. To avoid this effect, and the unpleasant motion and tendency to derangement consequent upon it, an additional motive is furnished for placing the axles at a considerable distance apart.

“The object of my invention is, among other things, to make such an adjustment or arrangement of the wheels and axles as shall cause the body of the car or carriage to pursue a more smooth, even, direct, and safe course, than it does as cars are ordinarily constructed, both over the curved and straight

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*Winans v. New York and Erie Railroad Company.*

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parts of the road, by the before-mentioned desideratum of combining the advantages of the near and distant coupling of the axles, and other means to be hereinafter described. For this purpose, I construct two bearing carriages, each with four wheels, which are to sustain the body of the passenger or other car by placing one of them at or near each end of it, in a way to be presently described. The two wheels on either side of these carriages are to be placed very near to each other; the spaces between their flanges need be no greater than is necessary to prevent their contact with each other. These wheels I connect together by means of a very strong spring—say double the usual strength employed for ordinary cars—the ends of which spring are bolted, or otherwise secured, to the upper sides of the boxes, which rest on the journals of the axles, the longer leaves of the springs being placed downwards, and surmounted by the shorter leaves. Having thus connected two pairs of wheels together, I unite them into a four-wheel bearing carriage, by means of their axles, and a bolster of the proper length extending across, between the two pairs of wheels, from the centre of one spring to that of the other, and securely fastened to the tops of them. This bolster must be of sufficient strength to bear a load upon its centre of four or five tons. Upon this first bolster I place another of equal strength, and connect the two together by a centre pin or bolt passing down through them, and thus allowing them to swivel or turn upon each other in the manner of the front bolster of a common road wagon. I prefer making these bolsters of wrought or cast iron; wood, however, may be used. I prepare each of the bearing carriages in precisely the same way. The body of the passenger or other car I make of double the ordinary length of those which run on four wheels, and capable of carrying double their load. This body I place so as to rest its whole weight upon the two upper bolsters of the two before-mentioned bearing carriages or running gear. I sometimes place these bolsters so far within the ends of the body of the car as to bring all the wheels under it, and in this case less strength is necessary in the car body than when the bolster is situated at its extreme ends. In some cases, however,



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*Winans v. New York and Erie Railroad Company.*

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I place the bolster so far without the body of the car, at either end, as to allow the latter to hang down between the two sets of wheels or bearing carriages, and to run, if desired, within a foot of the rails.

“When this is done, a strong frame-work projects out from either end of the car or carriage body, and rests upon the upper bolsters of the two bearing carriages. This last arrangement, by which the body of the car is hung so low down, manifestly affords a great security to the passengers, exempting them in a great degree from those accidents to which they are liable when the load is raised. Several bodies may be connected, or rest on a common frame, and be supported on the bearing carriage, in a manner similar to that of a single body. When the bolsters of the bearing carriages are placed under the extreme ends of the body, the relief from shocks and concussions, and from lateral vibrations, is greater than it is when the bolsters are placed between the middle and the ends of the body, and this relief is not materially varied by increasing or diminishing the length of the body, while the extreme ends of it continue to rest on the bolsters of the bearing cars, the load supposed to be equally distributed over the entire length of the body.

“Although I prefer the use of a single spring to a pair of wheels as above described, instead of the ordinary spring to each wheel, and consider it as more simple, cheap, and convenient, than any other arrangement, the end which I have in view may nevertheless be obtained by constructing the bearing carriages in any of the modes usually practiced, provided that the fore and hind wheels of each of them be placed very near together; because the closeness of the fore and hind wheels of each bearing carriage, taken in connection with the use of two bearing carriages coupled remotely from each other as can conveniently be done, for the support of one body, with a view to the objects and on the principles herein set forth, is considered by me as a most important feature of my invention, for, by the contiguity of the fore and hind wheels of each bearing carriage, while the two bearing carriages may be at any desirable distance apart, the lateral friction from the rubbing of the

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*Winans v. New York and Erie Railroad Company.*

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flanches against the rails is most effectually avoided, whilst at the same time all the advantages attendant upon placing the axles of a four-wheeled car far apart are thus obtained. The bearing of the load on the centre of the bolster, which also is the centre of each bearing carriage, likewise affords great relief from the shocks occasioned by the percussions of the wheels on protuberant parts of the rails or other objects, and from the vibrations consequent to the use of coned wheels; as the lateral and vertical movements of the body of the car resulting from the above causes are much diminished. The two wheels on either side of one of the bearing carriages may, from their proximity, be considered as acting like a single wheel, and as these two bearing carriages may be placed at any distance from each other, consistent with the required strength of the body of the car, it is evident that all the advantage is obtained which results from having the two axles of a four-wheeled car at a distance from each other, whilst its inconveniences are avoided. Another advantage of this car, compared with those in common use, and which is viewed by me as very important, is the increased safety afforded by it to passengers, not only from the diminished liability to breakage, or derangement in the frame work, but also from the less disastrous consequences to be apprehended from the breaking of a wheel, axle, or other part of the running gear, as the car body depends for its support and safety upon a greater number of wheels and bearing points on the road. I do not claim as my invention the running of cars or carriages upon eight wheels, this having been previously done; not, however, in the manner or for the purposes herein described, but merely with a view of distributing the weight, carried more evenly upon a rail or other road, and for objects distinct in character from those which I have had in view, as hereinbefore set forth. Nor have the wheels, when thus increased in number, been so arranged and connected with each other, either by design or accident, as to accomplish this purpose. What I claim, therefore, as my invention, and for which I ask a patent, is, the before-described manner of arranging and connecting the eight wheels, which constitute the two bearing carriages, with a railroad car, so as to

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*Winans v. New York and Erie Railroad Company.*

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accomplish the end proposed by the means set forth, or by any others which are analogous and dependent upon the same principles.

ROSS WINANS."

The patent was originally issued in 1834, and continued regularly until 1848, when it was extended by the Commissioner of Patents for seven years from the 1st of October, 1848.

The defendants pleaded the general issue, and gave notice under the statute that Winans was not the original inventor, but that, substantially, the same contrivance was described in many books, known to many persons, and used in many places. Other grounds of defence were also mentioned. The case came on for trial in June, 1856, when the jury found a verdict for the defendants.

The first exception was to the admission of the testimony of Conduce Gatch, a witness for the defendant, who had been examined under a commission. The questions and answers were as follows:

"One hundredth cross-interrogatory. Did you, before answering the said direct interrogatories, or the said cross-interrogatories, or any of them, see or read, or hear read, or hear stated, any part of, or the substance of any part of, any testimony given or affidavit made by you, or by any other person or persons, in the case of Ross Winans against the Eastern Railroad Company, or in the case of Ross Winans against Orsamus Eaton and others, or in the case of Ross Winans against the New York and Harlem Railroad Company? And, if yea, in what case was such testimony or affidavit given, and by whom was the same read or shown, or stated to you, or to any other person or persons in your presence or hearing?"

To this, Gatch answered:

"X 100th. To the one hundredth cross-interrogatory he saith: At the time of the commissioner's reading to me the direct interrogatories, when I was before him for the purpose of giving my deposition in this case, it struck me forcibly that the questions, if not identically the same, were the same in substance of those I had answered in the case of Winans against the New York and Harlem Railroad Company; and upon ascertaining that the commissioner had a copy of the answers I

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*Winans v. New York and Erie Railroad Company.*

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then gave, and for the purpose of facilitating the execution of this commission, I adopted the answers before referred to, altering them in some particulars so as to be more explicit; and I now declare that, independent of seeing the copy of my answers, the facts I have herein testified to are true."

The one hundred and second cross-interrogatory was too long to be inserted. It inquired whether he had heard, read, or stated, any paper, &c., &c.; and if any suggestion had been made in writing, &c., to annex a copy of such writing.

To which Gatch answered:

"To the one hundred and second cross-interrogatory he saith: I refer to my answer to the one hundredth cross-interrogatory."

Upon the trial, the counsel for the plaintiff moved to exclude the whole testimony of Gatch, because he did not annex the writing to his answer. But the court overruled the objection and admitted the evidence, which constituted the first exception.

After this, there were thirty-one exceptions taken, viz: nine to the refusal of the court to allow the plaintiff to prove certain matters which he offered to prove, fourteen to various parts of the charge of the court, and eight to refusals by the court to charge the jury in accordance with the prayers of the plaintiff.

As the first class of exceptions is particularly noticed in the opinion of this court, it is proper to mention the circumstances under which they were taken.

After the defendants had rested their case, and after the plaintiff had thereafter put in a part of his evidence in reply, the plaintiff made to the court the following offer to prove the facts and matters stated in said offer, namely:

"1. The plaintiff, by his counsel, offers to prove that the action of coned wheels, specified in the patent, requires the wheels to be fast on, and turn with their axles. That at the time the plaintiff's patent was granted, it was the general practice, in constructing cars for running at high velocities, to construct them with coned wheels, fast on and turning with their axles, and that non-coned wheels, or coned wheels turning on their axles, are not equivalent for, and cannot produce, the

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*Winans v. New York and Erie Railroad Company.*

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effects described in the patent as peculiar to the use of coned wheels."

The defendants objected to the proving of any of the facts and matters stated in said offer, on the ground that all of said facts and matters were immaterial and irrelevant, and the court sustained said objection, and refused to allow the plaintiff to prove any of the facts and matters stated in said offer, to which sustaining and refusal the plaintiff then and there duly and in due time excepted.

The plaintiff then made to the court the following offer to prove the facts and matters stated in said offer, namely:

"2. The plaintiff, by his counsel, offers to prove, that the end proposed in the specification of the plaintiff's patent cannot be effected by a car having two swivelling four-wheeled tracks connected with a body or platform, unless the wheels of the bearing carriages are coned on their treads, and are fast on, and turn with their axles."

The defendants objected to the proving of any of the facts and matters stated in said last-mentioned offer, on the ground that all of said facts and matters were immaterial and irrelevant; and the court sustained said last-mentioned objection, and refused to allow the plaintiff to prove any of the facts and matters stated in said last-mentioned offer, to which last-mentioned sustaining and refusal the plaintiff then and there duly and in due time excepted.

These two offers of proof by the plaintiff sufficiently show the character of the proof offered, and which the court ruled out. The remaining seven were similar in their character.

The exceptions to the charge of the court when construing the patent are too voluminous to be inserted, as are also the prayers to the court on behalf of the plaintiff.

Upon all these exceptions the case came up to this court.

It was argued by *Mr. Blatchford* and *Mr. Keller* for the plaintiff in error, and *Mr. Davis* and *Mr. Whiting* for the defendants.

In the argument of a patent case, it is impossible to give to the reader a clear idea of the arguments, because drawings and

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*Winans v. New York and Erie Railroad Company.*

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models were produced, without which all attempts at explanation would be superfluous.

Mr. Justice GRIER delivered the opinion of the court.

The patent which the defendants are charged to have infringed purports to be, "for a new and useful improvement in the construction of cars or carriages intended to travel upon railroads."

The specification commences with an enumeration of the difficulties attending short curves in railroads from friction, and the consequent necessity of placing the wheels, where four only are used, near together. But in high velocities the shocks from obstructions or inequalities on the rails are thus greatly increased; so that a compromise is usually made between the evils consequent on too great a separation and too near approach, wherein the advantage of one is necessarily sacrificed for the sake of the other. The incessant vibration felt in travelling on railroad cars is mainly imputed to the minute obstructions which unavoidably exist, and the approximation of the wheels necessary to avoid friction tends to increase the effect of this motion, and its power to derange the machinery of the road.

The important object which the plaintiff's invention seeks to obtain, as regards comfort, safety, and economy, "is to devise a mode of combining the advantages derived from placing the axles at a considerable distance, with those of allowing them to be situated near each other."

The specification then states the methods heretofore used to remedy these difficulties; such as making the track wheels conical, which, in case of slow travelling, has been found an effectual correction. But in high velocities it caused a serpentine motion, not only on curves, but where the track was straight. To avoid this effect, an additional motive is furnished for placing the axles at a considerable distance apart.

For this purpose the patentee proposes to construct two bearing carriages, each with four wheels, to sustain the body of the cars, one at or near each end thereof; the two wheels on either side of these carriages to be placed very near each other. These wheels may be connected by a strong spring, double the

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*Winans v. New York and Erie Railroad Company.*

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usual strength employed for ordinary cars. The use of this spring, though preferable, is not absolutely required, as the end in view may be obtained by constructing the bearing carriages in any of the modes usually practiced, provided the fore and hind wheels of each of the carriages be placed near together; because the closeness of the fore and hind wheels of each bearing carriage, coupled remotely from each other, is considered as the most important feature of the invention.

On each of these carriages a bolster is placed, on which the car body rests, connected with each by a centre pin or bolt passing down through them, thus allowing them to swivel or turn upon each other.

After this description of the improvement contemplated, and the objects to be gained by it, (of which we have given a brief summary,) the specification concludes with the following disclaimer and statement of what the patentee claims to have invented:

"I do not claim as my invention the running of cars or carriages upon eight wheels, this having been previously done; not, however, in the manner or for the purposes herein described, but merely with a view of distributing the weight carried more evenly upon a rail or other road, and for objects distinct in character from those which I have had in view, as hereinbefore set forth. Nor have the wheels, when thus increased in number, been so arranged and connected with each other, either by design or accident, as to accomplish this purpose. What I claim, therefore, as my invention, and for which I ask a patent, is, the before-described manner of arranging and connecting the eight wheels, which constitute the two bearing carriages, with a railroad car, so as to accomplish the end proposed by the means set forth, or by any others which are analogous and dependent upon the same principles."

The defence set up in the pleadings does not deny that defendants use cars constructed as described in the patent, but takes issue on the originality of the invention, averring, among numerous other matters, that the same, or substantially the same, improvement had been previously made and used on the Quincy railroad, near Boston.

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*Winans v. New York and Erie Railroad Company.*

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The first bill of exceptions taken on the trial is to the refusal of the court to reject a deposition taken on interrogatories, because the witness had not annexed to it a copy of a former deposition, which, in answer to a previous interrogatory, he admitted he had seen and had used to refresh his memory.

There are two sufficient reasons why this exception cannot be sustained. 1. By the rules of practice in force in the Circuit Court, such an objection cannot be made on the trial of a cause, when the party, as in this case, had full time and opportunity to move for a suppression of the deposition or a re-examination of the witness.

And, secondly, the paper was not in the power of the witness, but in that of the commissioner, or the plaintiff himself, who might have used it if he thought proper.

After the parties had each given evidence tending to prove the issues between them, and the defendants had closed their testimony, the plaintiff's counsel made nine distinct offers of proof, which were severally overruled as irrelevant, and exception taken.

They then proposed eight several instructions, which they requested the court to give to the jury, and took exceptions to the court's refusal. Besides all this, the charge was parcelled out into fourteen paragraphs, and an exception taken to each.

To state each one of these thirty-one propositions at length, and discuss them severally, would be a tedious as well as an unprofitable labor.

There was in fact but one question to be decided by the court, viz: the construction of the patent; the question of novelty being the fact to be passed on by the jury.

The testimony of experts which was rejected had no relevancy to the facts on which the jury were to pass, but seemed rather to be intended to instruct the court on some mechanical facts or principles on which the court needed no instruction, or to teach them what was the true construction of the patent.

Experts may be examined to explain terms of art, and the state of the art, at any given time. They may explain to the court and jury the machines, models, or drawings, exhibited.



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*Winans v. New York and Erie Railroad Company.*

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They may point out the difference or identity of the mechanical devices involved in their construction. The maxim of "*cuique in sua arte credendum*" permits them to be examined to questions of art or science peculiar to their trade or profession; but professors or mechanics cannot be received to prove to the court or jury what is the proper or legal construction of any instrument of writing. A judge may obtain information from them, if he desire it, on matters which he does not clearly comprehend, but cannot be compelled to receive their opinions as matter of evidence. Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue.

If the construction given by the court to the specification be correct, and in fact the only construction of which it is capable, as we think it is, it would be wholly superfluous to examine experts to teach the court, what they could clearly perceive without such information, that the necessity for coned wheels to avoid friction on curves was a consequence of the fact that the wheels were fixed to the axle.

The improvement claimed by the patent being a device to remedy, among other things, the serpentine or wobbling motion of such wheels in high velocities, the testimony offered concerning them, if it would have any effect at all, would tend only to mislead both court and jury from the only issue in the case.

The following extracts from the charge will show that the judge has given the only construction which the language of this specification will admit, and one which had been previously given by Mr. Chief Justice Taney in 1839, and again by Mr. Justice Nelson:

"According to the import and true construction of the plaintiff's patent and specification, he claims to be the first inventor of 'a new and useful improvement in the construction of cars

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*Winans v. New York and Erie Railroad Company.*

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and carriages intended to travel upon railroads,' which improvement consists in *the manner of arranging and connecting* the eight wheels, which constitute the two bearing carriages, with a railroad car, the object of which is to make such an adjustment of the wheels, axles, and bearings of the car, as shall enable a car with a comparatively long body to pass curves with greater facility and safety, and less friction, and as shall at the same time cause the body of the car to pursue a more smooth, even, direct, and safe course, over the curvatures and irregularities, and over the straight parts of the road.

"*The manner* of such arrangement and connection is to place upon the upper bolsters of two bearing carriages, each having four wheels, with the flanches of each pair of wheels very near together, the body of a car, so as to rest its weight and have the bearing of the load upon the centre or central portion of the bolsters, being also the centre or central portion of the bearing carriages; the bolsters of the bearing carriages and car body, respectively, being connected by centre pins or bolts, so as to allow them to swivel and turn upon each other, in the manner of the front bolster of a common road wagon, and the bolsters being placed at, near, or beyond, the ends of the body.

"And the closeness of the fore and hind wheels of each of the two bearing carriages coupled as remotely from each other as may be desired, or can conveniently be done, for the support of one body, is a most important feature of the invention, with a view to the objects and on the principles set forth in the specification.

"The patentee does not claim to be the inventor of a car body (either for freight or for passengers) of a new or peculiar construction in size or form, nor of any single and wholly separate part of the entire car; but he claims, as his invention, *the manner* of arranging and connecting the eight wheels, which constitute the two bearing carriages, with a railroad car, in the mode and by the means described in his specification, for the ends before described, whether such railroad car is adapted to the transportation of freight or of passengers.

"The leading principle set forth in the specification, upon which the arrangement and connection act to effect the objects

*Pennsylvania v. Ravenel.*

aimed at, is, that by the contiguity of the fore and hind wheels of each bearing carriage, and the swivelling motion of the trucks or bearing carriages, the planes of the flanches of the wheels conform more nearly to the line of the rails, and the lateral friction of the flanches on the rails, while entering, passing through, and leaving curves, is thereby diminished; while at the same time, in consequence of the two bearing carriages being arranged and connected with the body of a passenger or burden car, by means of the king bolts or centre pins and bolsters, placed as remotely from each other as may be desired or can be conveniently done, and with the weight bearing upon the *central* portion of the bolsters and bearing carriages, the injurious effects of the shocks and concussions received from slight irregularities and imperfections of the track, and other minute disturbing causes, are greatly lessened."

The remarks of the court about the want of a disclaimer, where the patent claimed too much, though correct as a general statement of the law, could have little bearing on the present case, where the disclaimer, to be effectual, would include the whole invention claimed.

It is abundantly evident, therefore, that the court having given a correct construction to the patent, there could be no error in refusing to give a different one, or in refusing to admit testimony which, under this construction, was wholly irrelevant to the issue on which the jury were about to pass.

The judgment of the Circuit Court is therefore affirmed, with costs.

Mr. Justice DANIEL dissents, on the ground of a want of jurisdiction.

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**THE COMMONWEALTH OF PENNSYLVANIA, PLAINTIFF IN ERROR, v.  
WILLIAM RAVENEL, EXECUTOR OF ELIZA KOHNE, DECEASED.**

The question of domicile, so far as it depends upon the facts, is one for the jury. But it was proper for the court to instruct the jury what constituted a domicile in law; and to say, further, that as the husband had his domicile in Pennsylvania at the time of his death, the domicile of the widow remained also in Pennsylvania. Whether or not she afterwards changed it to South Carolina, was a ques-

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*Pennsylvania v. Ravenel.*

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tion for the jury, to be decided by the evidence. If they believed this evidence, then the domicil of the widow was in South Carolina. Her acts and declarations, continued for many years, were to be received as evidence of this choice upon her part. .

[MR. JUSTICE WAYNE DID NOT SIT IN THIS CAUSE.]

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Pennsylvania.

It was an action brought by the State of Pennsylvania to recover the sum of \$5,820.23, a collateral-inheritance tax, alleged to be due from the estate of Mrs. Kohne. It was admitted, that unless her domicil was in Pennsylvania, the tax was not due.

The following statement of facts was made by the counsel for the Commonwealth, with the exception of the early history of Mrs. Kohne, which was this, according to the testimony of Mr. Pettigru :

“She was born in Charleston, her father and mother being natives of that place. She never went away till after the fall of Charleston, in 1780. Her father was then taken off as a prisoner to St. Augustine, and her mother took refuge in Philadelphia, where she and her daughter continued until the cessation of hostilities; they then returned to Charleston, where she resided without interruption until her marriage. In May, 1807, she married Frederick Kohne, then and for many years previously a resident of Charleston, where they resided at first all the year, and afterwards alternately between that place and Philadelphia.”

*Statement of Facts on the part of the Commonwealth.*

Mr. Kohne, the husband of Mrs. Eliza Kohne, died in Philadelphia on the 26th day of May, 1829, and was buried there. He was domiciled in Philadelphia at the time of his death, which place was therefore the domicil of his widow at that time. Mr. Kohne, at the time of his death, owned valuable real and personal estate in Philadelphia city and county, and also in Charleston, S. C. Among the Philadelphia property

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*Pennsylvania v. Ravenel.*

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was a large and elegant mansion house in Chestnut street, built by Mr. Kohne in 1819, and in which he resided with his wife from that time until his death in 1829, except when he visited Charleston, S. C., where he and she usually spent the winter, leaving Philadelphia about October or November, and returning about May. They did not, however, continue these visits to Charleston during the last few years of Mr. Kohne's life, owing to ill health, or other causes, but remained altogether in Philadelphia. Mr. Kohne, at the time of his death, also owned a mansion in Charleston, S. C., in which he and his wife resided during the winter, as already stated. Both mansions were furnished with servants, furniture, plate, &c. Mr. Kohne also owned, at the time of his death, a valuable country seat, with thirty acres of land attached, close to the city of Philadelphia, in Turner's Lane, and now within the corporate limits of that city, which was purchased by him in 1807, about the time of his marriage, and during his lifetime was sometimes occupied by Mr. and Mrs. Kohne, and by Mrs K. after his death.

Mr. Kohne devised his real estate, wherever situate, to his wife for life, (with some exceptions in Charleston, S. C.) Her life interest extended to the mansions referred to in Philadelphia and Charleston, and to the Turner's Lane property in Philadelphia.

She did not visit Charleston the winter after her husband's death, but spent a part of it in Savannah. After that winter, however, she resumed the routine which had existed some years prior to her husband's death—that is, of spending from May to October in Philadelphia, and from November to May in Charleston.

After Mr. Kohne's death, in 1829, Mrs. Kohne had his body interred in ground belonging to Christ Church, Philadelphia, and she had the grave constructed large enough for two persons beside each other—doubtless anticipating and providing for what occurred twenty-three years afterwards, her own interment by his side. She was an old member of that church, and had a right to be buried in any part of the ground. Eight years after her husband's death, Mrs. Kohne, in 1837, bought

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*Pennsylvania v. Ravenel.*

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a lot in Laurel Hill Cemetery, in which she had some one buried, and which she owned at her death.

In the same year, 1837, her real and personal property assessed for taxes in Philadelphia included the mansion in Chestnut street, assessed at \$27,600, eight shares South Carolina bank stock, stock in other States, &c. These stocks would not have been subject to taxation under the Pennsylvania law, unless she had been domiciled in Pennsylvania, and she continued to pay taxes on them and similar stocks down to the time of her death, in 1852.

In 1839, she purchased a dwelling-house and lot of ground in Philadelphia, and the conveyance describes her as Eliza Kohne, of the same city, (viz: Philadelphia,) widow. This conveyance she refers to in her will, in devising the property to Susan Ingles, one of her servants.

Mrs. Kohne continued to reside alternately in Charleston and Philadelphia, according to the season of the year, until April 30, 1850, when she left Charleston, to return there no more, and came to Philadelphia, followed soon after by her whole Charleston household, (except one old female servant,) all of whom remained with her in Philadelphia until her death, March 16, 1852, and none of them returned to Charleston during her life. These were Emma and her husband, Jacob, Peter, Margaret, and Carolina, servants or slaves.

Mr. Frederick Kohne's name is found in the Philadelphia Directories from 1814, and Mrs. Eliza Kohne's from 1830 to 1852.

When the cause came on for trial, there was much evidence given upon both sides, when the court instructed the jury as follows:

"That a question of domicil was one of mixed law and fact. That it was for the court to instruct the jury what constituted domicil, and for the jury to apply the principles of law laid down by the court to the facts as found by them, and thus render a true verdict on the issue they were sworn to try; that the jury had no right to disregard the law as stated by the court, and the court had no right to dictate to them on the

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*Pennsylvania v. Ravenel.*

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facts which they were bound to find on their own responsibility.

“The court then proceeded to define the meaning of the word domicile, and the principles of law on the subject, reading from their charge on the Aspden case such parts of it as had a proper application to the general question and were applicable to this case. That charge is found in *White v. Brown*, (1 Wallace, jun.) In application of these general principles of the law to this case, the court stated that it had been affirmed that the domicile of Frederick Kohne was Pennsylvania, because, for three or four years before his death, he had been unable to return to his house in Charleston, had died and was buried in Philadelphia, and called himself, in his will, ‘Frederick Kohne, of the city of Philadelphia.’ Under these circumstances, it appears his executors did not see fit to dispute his domicile, but submitted to pay the collateral-inheritance tax; that, notwithstanding all this, it was not a very clear case that his domicile was in Pennsylvania, had his executors seen fit to dispute it. But for the purposes of this case, we should assume that fact; that, from the legal unity of husband and wife, her domicile was necessarily his while the marriage existed; after his death, she was free to choose her own domicile. If the jury find, that after his death she returned to her former domicile in Charleston, took possession of the house and servants devised to her; lived in that house six or seven months of every year, calling it her home, spending only a few weeks in the spring and fall in her house here, and the remainder of the summer at watering-places; coming north in the summer for the sake of her health, always intending to return to her house in Charleston; that she was hindered returning the last time from sickness; if she consulted counsel how she might avoid giving any pretence to the tax-gatherers of Pennsylvania to treat her as domiciled here; if she carefully denied at all times her citizenship in Philadelphia, even to erasing it from printed lists of her church donations, as the assertion of a falsehood; if she refused to have some of her furniture removed here, for fear such a fact would be seized upon after her death for the purpose of asserting her domicile here; if she called herself, in her will, ‘of

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*Pennsylvania v. Ravenel.*

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Charleston; if, when absent from that place, she always spoke of returning to it as her home, and did return to it as such, till hindered by sickness—if the jury believed this evidence of defendant's witnesses, testimony which has not been contradicted or denied, it would be absurd to say her domicile was not where she asserted it to be, to wit, in the city of Charleston. It is true, the mere speaking of a place as home, in the cant language of the Canadians and other provincials, without any act showing an intention of returning to it, would amount to nothing. But if the acts and the language concur, as proved by these witnesses in this case, it would be a denial to the deceased of the right to choose her own domicile, not to allow her acts and declarations, continued for many years, to be conclusive of the fact."

Exceptions were taken to parts of this charge, and the case came up to this court.

It was argued by *Mr. Scott* and *Mr. Hood* for the plaintiff in error, and by *Mr. Gerhard* for the defendant.

The points stated by the counsel for the plaintiff in error were the following:

1. That the court charged the jury as to part only of the evidence, viz: that for the defendant.
2. That the court charged the jury as to facts of which there was no evidence.
3. That, in effect, the court took from the jury the sole material fact in the cause, viz: the domicile of Mrs. Kohne at the time of her death.

In order to sustain these points, it was necessary for the counsel for the plaintiff in error to establish two propositions:

1. To show, from an examination of the evidence, that the instructions of the court were in opposition to or not sustained by it.
2. That this was an error to be corrected by this court; and in support of this proposition they cited numerous authorities. But as this court was of opinion that the first proposition was not made out, it is not necessary to recite the authorities in support of the second.



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*Pennsylvania v. Ravel.*

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*Mr. Gerhard* denied both propositions as stated above, but his authorities are omitted for the same reason.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the eastern district of Pennsylvania.

The action was brought by the State of Pennsylvania against the defendant, executor of the late Mrs. Kohne, to recover the sum of \$5,820.23, called a collateral-inheritance tax, assessed upon the personal estate of the testatrix. By the law of Pennsylvania, where the property of the deceased passes to his or her collateral heirs, or to strangers, either by the law concerning intestate estates, or by will, it is made subject to a specific taxation for the benefit of the State. This tax is five per centum on the clear value of the estate. (*Brightly v. Purdon*, p. 138; act 22d April, 1846, sec. 14.) And according to the construction of these acts imposing the tax, it is held, if a decedent be domiciled in the State at the time of his or her death, stocks of other States, or of corporations of other States, and debts due in other States, in the hands of the executors or administrators, are liable to this tax. (4 Harris's Rep., 63; 18 Howard's Rep.)

But if the domicil of the deceased be not in Pennsylvania, then the estate is not subject to the tax.

Mrs. Kohne died in the city of Philadelphia in March, 1852, and the question in the court below was, whether or not she was domiciled in Pennsylvania at the time of her death, or in the State of South Carolina. The jury, under the charge of the court, found a verdict for the defendant.

The case is before us on four exceptions taken to the charge of the court.

The first three it is not material to notice further than to say, that the two first are founded upon a misapprehension of the instructions given to the jury; and the third is not maintainable, as the instruction in the connection in which it is found is unobjectionable.

The fourth exception is, that the court, in the charge, took the fact of domicil from the jury.

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*Pennsylvania v. Ravenel.*

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This exception, we think, is founded in a misapprehension of the instructions given. The court, after stating to the jury that the question of domicile was one of mixed law and fact, observed, that it was for the court to instruct them what constituted a domicile, and for the jury to apply the principles of law governing it to the facts as found by them; that the jury had no right to disregard the law as laid down by the court, and the court had no right to dictate to them as respected the facts, which they must find on their own responsibility. The court then stated to the jury the principles of law applicable to the question of domicile, to which no exception has been taken. Also, that as it had been admitted Mr. Kohne, the husband, who died in Philadelphia in 1829, had his domicile in Pennsylvania at the time of his death, the domicile of the wife must be taken as in that State at the time, and submitted the question whether or not she had since changed it to the State of South Carolina; and then, after referring to the leading facts given in evidence, and relied on to establish a change of domicile, observed, that if the jury believed this evidence, the domicile of Mrs. Kohne was in South Carolina.

The court further say, that the mere speaking of a place as a home, without any act showing an intention to return to it, would amount to nothing. But if acts and the language concur, as proved by the witnesses in the case, it would be a denial to the deceased of the right to choose her own domicile, not to allow her acts and declarations, continued for many years, to be conclusive of the fact.

We perceive nothing in the instructions of the court, or in the view of the case as presented to the jury, by which the question of domicile, so far as it depended upon the facts, was taken from the jury. The evidence was very strong in support of a change of domicile by Mrs. Kohne after the death of her husband, and, if believed by the jury, it was not too much to say, as matter of law, that they should find for the defendant.

The judgment of the court below is affirmed.

**Mr. Justice DANIEL**, dissenting.

I cannot concur in the opinion of the court in this case.

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*Pennsylvania v. Ravenel.*

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Had I been acting as a juror upon the trial of this cause, it is more than probable that the conclusion formed by the jury upon the evidence disclosed by the record is identical with that at which I should have arrived. And, further, had it been within the legitimate province of the court, in the attitude of the case before it, to declare what ought to be the deductions from facts either established in evidence, or presumed or supposed by the court to have been established, or even from facts admitted by the parties on the trial, then exception to the charge of the court in this case could not properly be taken. The objection to the charge, and a fatal objection to my mind, arises from the principle that the court had no authority to pass upon or to give any opinion in relation to facts, either established by testimony or admitted or presumed, as to what those facts amounted to, or as to the correctness or the absurdity of any deduction which the jury might draw from them. The power of the court was limited absolutely to the legality or relevancy of the testimony. The weight or effect of the testimony, or the deductions to be drawn from it, were peculiarly and exclusively within the province of the jury; and the court had no power to inform them, or intimate that evidence, either exhibited in reality or presumed, should be construed in any particular way, or to say to them *a priori* that an interpretation different from that of the court, as to the weight of evidence, would be absurd. Should the conclusion of the jury upon the weight of evidence be never so absurd, still it is the peculiar province of the jury to weigh that evidence, and to draw their own independent inferences from it; and the only legitimate corrective is to be found in the award of a new trial, or by a case agreed, or a demurrer to evidence. If the court can *a priori* direct the jury what the evidence, either made out in proof or hypothetically stated, really amounts to, the trial by jury becomes a cumbersome formality, and had as well, nay, had better be dispensed with, inasmuch as in the solemn administration of justice there should be as little that is useless, burdensome, or pretended, as possible. To show the character of that portion of the charge of the court regarded as exceptionable, it is here inserted, as follows, viz :

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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"If the jury find, that after his death (the death of the husband) she (Mrs. Kohne) returned to her former domicil in Charleston, took possession of the house and servants devised to her, lived in that house six or seven months of every year, calling it her home, spending only a few weeks in the spring and fall in her house here, and the remainder of the summer at watering-places; coming north in the summer for the sake of her health, always intending to return to her house in Charleston; that she was hindered returning the last time from sickness; if she consulted counsel how she might avoid giving any pretence to the tax-gatherers of Pennsylvania to treat her as domiciled here; if she carefully denied at all times her citizenship in Philadelphia, even to erasing it from printed lists of her church donations, as the assertion of a falsehood; if she refused to have some of her furniture removed here, for fear such a fact would be seized upon, after her death, for the purpose of asserting her domicil here; if she called herself, in her will, 'of Charleston;' if, when absent from that place, she always spoke of returning to it as her home, and did return to it as such, till hindered by sickness—if the jury believed this evidence of defendant's witnesses, testimony which has not been contradicted or denied, it would be absurd to say her domicil was not where she asserted it to be, to wit, in the city of Charleston."

Regarding this portion of the charge as tending to confound the powers of the court and the jury, I think that the judgment of the Circuit Court should be reversed, and the case remanded for a new trial.

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**THE COVINGTON DRAWBRIDGE COMPANY AND RICHARD M. NEBKER, APPELLANTS, v. ALEXANDER O. SHEPHERD AND OTHERS.**

The decision of this court in 20 Howard, 227, as to what averment in the declaration is sufficient to give jurisdiction to the courts of the United States, again affirmed.

Where there was a judgment at law against a bridge company, under which the tolls were sold in execution, a court of equity has power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgment at law.

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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THIS was an appeal from the Circuit Court of the United States for the district of Indiana.

The facts of the case are stated in the opinion of the court.

As the decree of the Circuit Court was affirmed, and directed to be carried into execution, it may be proper to state what that decree was, viz:

"It is therefore ordered, adjudged, and decreed, that John McManaway be, and he is hereby, appointed a receiver of the tolls and revenues of the said Covington Drawbridge Company; that he enter upon, and, by himself, his agents, and servants, possess himself of and control the said bridge, absolutely, and free from all let and hindrance of the said Covington Drawbridge Company, their agents and servants, and other persons whatsoever. And it is further ordered, adjudged, and decreed, that during the time the said John McManaway shall be the receiver of the said tolls and revenues of said bridge, the said company shall in no wise molest or disturb the said receiver in the possession thereof, or in the reception of the tolls and profits thereof, and that said receiver may and shall receive the same tolls provided for in section three of the act of the General Assembly of the State of Indiana, approved January 15th, 1850, incorporating said company. Said receiver shall keep a daily account of his receipts and expenditures, which shall be open to the inspection of the parties. It is further ordered, adjudged, and decreed, that it shall be the duty of the said receiver, by himself and other qualified person or persons, during that time that the Wabash river may be navigable for steamboats, to raise or otherwise remove the draw in said bridge when boats are approaching, by night or day; and it shall be the further duty of said receiver to cause lights to be placed on each side of the draw of said drawbridge, when the said river is so navigable; and it shall be the further duty of the said receiver to keep the said bridge in suitable and necessary repairs, the expenses of which shall be paid and borne by the said receiver out of the tolls and income of said bridge, as well as his own fees and charges for the discharge of his said duty as receiver. And it is further ordered, adjudged, and decreed, that the said receiver shall,

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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from time to time, at least as often as every three months, pay whatever sum of money there may then have accumulated in his hands of the tolls and income of said bridge, over and above the expenses as aforesaid, to the complainants herein, in a *pro rata* proportion upon their respective judgments in the complaint mentioned; and, further, that the said receiver do, at each succeeding term of this court, report thereto his entire actings and doings in and about his said receivership, provided, that before said receiver shall enter upon his said duties, and take possession of said bridge, he shall take an oath well and faithfully to perform his said duties, to be endorsed on his bond next mentioned, and that he shall, with one or more freehold securities, to be approved by H. C. Newcomb, master in chancery, within thirty days, enter into a penal bond in the sum of ten thousand dollars, payable to the State of Indiana, conditioned for the faithful performance of his duties and trusts imposed upon him by this order, which bond upon breach thereof shall be for the benefit of either party interested."

An appeal from this decree brought the case up to this court, where it was submitted on printed arguments by Mr. O. H. Smith for the appellants, and Mr. Thompson for the appellees.

The first point raised by Mr. Smith was relative to the jurisdiction. Probably his argument was printed before the decision of this court, as reported in 20 Howard, 227, reached him.

The novelty of the question in this court, as to the power of a court of chancery, has induced the reporter to take particular notice of the remaining points in the case.

Mr. Smith contended:

*Third. Although the judgments and executions may not have been satisfied by the levy and sale stated in the return at law, still they placed the property of the execution defendants in the custody of the law, sufficient in amount to satisfy the judgment, with ample legal powers to make the money, by process at law, and a court of chan-*

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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*cery will not entertain jurisdiction in aid of proceedings in a court of law until the legal remedy is exhausted. The remedy at law is ample, and a court of chancery will not take jurisdiction.*

Coe v. Turner, 5 Conn. R., 86.

Wisnell v. Hall, 3 Paige, 818.

Reese v. Parish, 1 McCord, 59.

Bird v. Holaboard, 2 Root, 35.

Wolcot v. Sullivan, 6 Paige, 117.

Baker v. Biddle, Baldwin R., 894.

*Fourth.* If the following question should be raised by the appellees in their brief, as it was in the Circuit Court, and this court should deem it material to be decided, then I maintain the affirmative as being the law:

Could the bridge be levied upon by the executions at law, the rents and profits appraised and sold, as was *done in this case*? Can there be any doubt about it? By the laws of the State of Indiana, all *property* of the execution defendants is subject to execution, unless especially excepted. The only *legal question is, whether this drawbridge is property of the execution defendants.* That is not questioned, in fact, by either side, but it may be said by the execution plaintiffs, that they could not enjoy the bridge by collecting tolls, without exercising the franchise, which they could not do unless it could be sold with the bridge, and they become the purchaser. To this I answer, that the bridge, with the right to exercise the franchise and take tolls, would unquestionably be worth more than the bridge without that right; but this is only a question for the *appraisers*, before the sale, and does not affect the *main question*, whether the bridge, or the rents and profits, can be levied upon, appraised, and sold, under an execution at law, *for what it is worth.* It may prove injurious to the execution defendants; but so long as they do not complain, who shall be heard in a court of chancery, or in this court, to complain? If the appraisement was too high, or took into consideration rights that did not belong to the *bridge, as property*, the execution plaintiffs could have moved the court at law to set aside the levy or appraisement. But they have not done so, and the *levy and appraisement stand without objection, as a part of the record,*

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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authorizing the appellees to complete their purchase, or to issue writs of *venditioni exponas*, to sell the property again at law, and satisfy their judgments. *Their remedy at law is complete.*

*Fifth.* But, as the further question may arise, and be deemed by the court important to be decided, although I cannot so consider it in this case, where the property levied upon is amply sufficient—that is, *whether the franchise can be levied upon with the bridge, and the whole property appraised and sold upon the execution at law.* I maintain the affirmative of this question, which I admit is one of much importance to the credit of corporation securities, as well as to the rights of their creditors. *The question is, substantially, whether the general execution laws of the State of Indiana shall be applied in all cases between debtor and creditor, on judgments at law, including corporations, new cases as they arise, as well as old, or shall an exception, not in the law, exempting from execution certain property of corporations, be made by the court?* At common law, real estate was not subject to sale on execution, and has only been so subjected within the present century. In England, until within the time of the present generation, there were no trading corporations of the sort to require such remedies. At common law, therefore, in England, there are no precedents to which we can refer, but there are principles that must govern the question.

1. *All grants are subject to the law of the land in force at the time the grant is made.*

2. *What is a franchise?* A franchise is a portion of the sovereignty, a part of the eminent domain, granted by the public for the public good, only to be used by the grantees, in the manner prescribed for the object of the grant, but not consecrated and placed as a sovereign above the ordinary laws and remedies of the land, as many seem to suppose. At common law, this franchise was also an exclusive privilege, as in the case of manor, mills, and like cases. All corporations are said to have a franchise, but the ordinary rights of corporations are not parts of the eminent domain—the privilege to have a common name and common seal, a perpetual succession, and by such common name to sue, to contract, to hold real estate, and



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*Cvington Drawbridge Company et al. v. Shepherd et al.*

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to sell the same, or to make by-laws for the government of the members. These privileges are no part of the eminent domain, but only extensions, to individuals collectively, of rights appertaining of common right to each.

Mr. Justice Woodbury, in 6 Howard 539, 540, *West River Bridge v. Dix*, says: The laws of the land are virtually a part and condition of the grant itself, as much as if inserted in it *totidem verbis*.

Town *v. Smith*, 1 Woodb. and Minot, 134.

1 Howard, 319.

2 Howard, 608, 617.

3 Story on Const., 1377, 1378.

It is on this principle that the exercise of the eminent domain over franchises has been sustained; otherwise, such exercise would be a breach of the contract implied in grant of the franchise, and a violation of the Constitution of the United States.

*West River Bridge Co. v. Dix*, 6 Howard, 507.

*Enfield Toll Bridge Co. v. Harts and N. H. R.*, 17 Conn., 40 S. C.

2 Amer. R. R. Cases, 69 S. C., 95.

*Beekman v. Sar. and Schen. R. R. Co.*, 3 Paige R., 45.

*Billings v. Prov. Bank*, 4 Peters, 514.

In 4 Peters, 514, it is said by Chief Justice Marshall: "The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men; any privilege which may exempt it from the burdens common to individuals do not flow necessarily from the charter, *but must be expressed in it, or they do not exist.*" In other words, corporations, unless expressly exempted, are subject to all the burdens imposed by the laws of the land on individuals. The rule is not to be confined to cases within the eminent domain, or to the taxing powers. It applies to all cases which, in the opinion of the legislative power, its application is necessarily for the public good. A franchise may or may not be a portion of the eminent domain. But a franchise is property: "We are aware of nothing peculiar to a franchise, which can class it higher or render it more sacred than other property

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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A franchise is property, and nothing more. It is incorporeal property, and is so defined by Blackstone, 2 Com., chap. 3, p. 20."

West River Bridge Co. v. Dix, 6 Howard, 534.

See the opinion of Justice Woodbury, same case, 541, 542.

As property, a franchise may be divided, leased, mortgaged, sold; (Gunning on Tolls, 106, 110; 6 Barn. and Cress., 703, 5, 875; 8 Maule and Sel., 247; 1 Comp. and Jervis, 57;) and it is property by grant, taken subject to the general laws of the land, in force at the time of the grant, at least.

The question now arises: "Is a franchise subject to execution at law by the laws of Indiana?" "The property, rights, credits, and effects, of the defendants, are subject to execution." (2 vol. Rev. Stat. of 1852, sec. 134, 433.) There is only one exception, and that does not exempt a corporation debtor or its franchise. By sec. 438, a debt can be levied upon and sold only when "given up by the defendant;" but no property, either corporeal or individual, is exempted, except a limited amount of personal property, in favor of families; and such has at all times been substantially the law of the State of Indiana. Franchises are not personal property, and of course could not be sold in England by a *fi. fa.* as goods and chattels. But undoubtedly the rents and profits of ferries, and markets, and mills, and the rents and profits of other real estate, have always been subject to seizure in England.

In Indiana, on a judgment against the owner of a ferry, if you sell the land, the ferry right will pass to the purchaser, with the land, as it is appendant thereto, and cannot exist without it. So with the sale of a mill, where the seat has been condemned, the purchaser takes the property with the privileges of keeping up the dam and taking tolls under the State law. But in Indiana there must be an appraisement of the property, and that assessment will be of the real estate and the right to exercise the franchise, the rents and profits being first valued, and first sold, as the franchise held by an individual, in a mill or ferry, is subject to sale with the property, and descends to heirs. Why does not the same principle apply to a toll bridge, held by a corporation, where the legal tolls are fixed by law,

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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as in this case? The decision of the court in the case of the West River Bridge, (6 How., 538,) is referred to as directly in point.

If it were shown that corporations in Indiana are exempt from the execution laws of the State, and as such protected in their property from levy and sale, and that consequently they form an exception to the general laws that govern other debtors, relieving them from the payment of their debts, there would be an end of the question; but as such is not the case, it is submitted that their property, including the franchise, is subject to appraisement and sale, as was done in this case at law, and therefore the appellees have no equity on that ground alone, and the decree of the Circuit Court should have dismissed the bill at the cost of the complainants below.

I maintain, further, that the appellants, being the execution defendants at law, are the only party that can raise the question, whether this property can be sold at law; and as they *insist* that it shall be so sold, and as it has been so sold, it does not lie with the appellees, the execution plaintiffs, to say that the property in question was not subject to be sold at law. They do not deny but that it has been levied upon *at their instance*, and appraised and sold, and the levy and appraisement returned; nor is it material to the question whether the purchaser shall pay for the property and receive a deed or certificate of purchase, or not, as a *venditioni exponas* can issue upon the return, at any subsequent time, *pending* which, and before another sale, the levy, appraisement, and return, are a *prima facie* satisfaction of the judgments. Therefore there can be no equity in the case, and the decree of the Circuit Court should be reversed, with directions to the court to dismiss the bill.

*Mr. Thompson's* reply to the latter points was as follows:

The fourth assignment of errors, that the court erred in overruling the demurrer to the original bill, in effect raised for the consideration of the court the whole question in the case, viz: Has the court of chancery jurisdiction to appoint a receiver of the rents and profits of a corporation defendant which is insolvent, or has no available real estate except that which is

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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derived from the use of its franchise? That the court has such power, and that it has at all times been exercised for the advancement of justice, the repeated decisions of the courts will show.

The case of *Fripp v. The Chard Railway Company*, is an authority for all we ask here.

21 Eng. L. and Eq. Rep., 53.

It appears from the bill in this case, and it is not denied, that all the possible ways or means which the complainants have of making their debt or judgments is out of the defendants' bridge. That is all the property the defendants have. They say, "there is the bridge; take it." If it was clear that the plaintiff could regard the bridge as real estate, and sell it under the Indiana execution laws, by exposing the rents and profits to sale, and that the purchaser could enjoy those rents and profits upon the purchase; or, if the purchaser of the bridge could keep it up, and receive the tolls, then the plaintiffs might have an adequate remedy at law.

Nebeker, in his answer, put in under oath, states that the company has no right to the soil upon which the bridge stands; it is at most in the allegation of the bill but a mere easement—nothing that the execution or plaintiffs could make out of it, by sale. If the bridge is real estate, then the rents and profits are to be sold; if personal, then the rents and profits could not be sold. What kind of property is it?

The complainants say that the bridge is valueless, *except in connection with the franchise—the right to take tolls*. Nebeker answers, that he is advised and believes that the franchise cannot be sold nor exercised by third persons, except by consent of the corporation.

The Circuit Court of Indiana has adopted the statute of that State, requiring the appraisement of property upon execution sales. If the property is real estate, the rents and profits have to be appraised as well as the fee; and the fee cannot be offered as long as the rents and profits are sufficient, at two-thirds their appraised value, to pay the debt. If the bridge is personal property, then two-thirds of \$70,000 would have to be paid for the bridge, which the purchaser could not lawfully maintain

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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one hour over or upon that public highway, the Wabash river. So that the court can see that this bridge company has brought the complainants to a "dead lock," and they have no other adequate remedy but a receiver.

The grant in this case being to three persons, if they sell out their bridge, or it is sold out by execution, the bridge becomes the property of a private individual, and the charter of the defendants is forfeited, and the existence of the company will be, by the act, terminated.

In the matter of Highway, 2 New Jersey, 293.

In the case of *Macon and Western Railway v. Parker*, (9 Geo., 377,) it is doubted whether a railroad is subject to levy and sale. It is said it would expose the property to sacrifice, be detrimental to the interests of creditors, and defeat the objects and intentions of the Legislature in granting the charter. In North Carolina (*State v. Rives*, 5 Iredell, 297) it is held, that the tangible property of a railroad could be sold, but that its franchise could not. A turnpike road cannot be sold on execution.

*Ammans v. New Alexander Turnpike Co.*, 13 Rawle, 210.

In this case, the grant was to the corporators for the benefit of the public. The public were to use the bridge, and these corporators were intrusted with the important duty of keeping and maintaining it over the navigable waters of the Wabash river, so as not to obstruct the navigation thereof.

There is no equity with the defendants. It is evident they were baffling and trifling with the complainants. They are in the possession of a large annual sum of rents and profits, worth, in the opinion of the appraisers, \$7,000 per annum, and sworn by Nebeker to be from \$620 to \$1,817 per quarter. With these moneys the plaintiffs' judgments could readily be paid, were it not for the unconscientious resistance of the defendants.

The decree of the court, in appointing the receiver, was of the most favorable character to the defendants. It provided for conforming, in every respect, with the charter of the defendants; and by it the complainants were constrained to wait for their pay until it was earned in tolls at the bridge. Not many debtors can impose upon their creditors such delay as that; but

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*Covington Drawbridge Company et al. v. Shepherd et al.*

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so it is, by their peculiar charter the plaintiffs have no other remedy.

Mr. Justice CATRON delivered the opinion of the court.

In December, 1854, Shepherd and others recovered a judgment against the Covington Drawbridge Company, for upwards of six thousand dollars. At the same time, Davidson recovered a judgment against the same company for upwards of a thousand dollars.

The corporation was created by an act of the Legislature of Indiana, and built a drawbridge over the Wabash river, in that State, pursuant to its charter; was sued for a *tort* in the Circuit Court of the United States for Indiana district, where the recoveries were had. Executions at law were regularly issued, and at March term, 1855, of that court, were returned by the marshal, "nothing found." Alias writs of *fi. fa.* were taken out and levied on the bridge as real estate, and in November, 1855, the marshal proceeded to sell the rents and profits of the same on Davidson's judgment for the term of one year, at the sum of \$4,666.62, Davidson, the execution creditor, becoming the purchaser. The agent of Shepherd and others instructed the marshal not to sell the bridge on their judgment, and he returned the special facts. Davidson demanded possession of the bridge from the corporation, so that he might obtain the tolls, but the keeper of the bridge, and a principal owner of the stock, refused to surrender possession. In May, 1856, Shepherd, and those interested in the large judgment jointly with Davidson, filed their bill in equity in the Circuit Court of the United States for the district of Indiana, against the bridge company and Richard M. Nebeker, as keeper, agent, and manager, of the bridge; praying that the court should appoint a suitable receiver to take possession of the same, and receive the tolls and income, and apply them to discharge the judgments at law, after defraying expenses. The court made the decree prayed for, from which the bridge company appealed to this court.

The first objection made to the decree is, that it does not appear by the bill that the defendant is properly described as

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*Covington Drawbridge Company et al. v. Shephera et al.*

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incorporated by the State of Indiana. The bill alleges that "The Covington Drawbridge Company, of Covington, is a corporation and citizen of the State of Indiana;" and it is also insisted, that the judgments at law are void, because jurisdiction was not given to the United States courts by the averment of citizenship in either of the declarations. The judgment at law, in Shepherd's case, was brought before this court at the last term, when it was held that the averment of citizenship here objected to was sufficient. (20 Howard, 227.) That decision is conclusive of the two foregoing exceptions.

The consideration whether by a creditor's bill corporate property and franchises can be subjected to pay the debts of the corporation, by taking possession and administering its affairs, and drawing to the court its revenues, is a question of great importance and some difficulty. In advance of this question, it is insisted here that there exists in Indiana an adequate remedy at law; that Davidson's judgment is satisfied by the levy and sale of the tolls of the bridge; and Davidson having obtained a remedy by *fi. fa.*, Shepherd may do the same. To ascertain whether Davidson obtained satisfaction by the marshal's sale, we must inquire what property was sold, and what title to it acquired, that could be made available by possession and the receipts of tolls.

The Covington Drawbridge Company was duly incorporated to build a bridge across the Wabash river where it was navigable for steamboats, and not subject to be bridged by an individual assuming to exercise a mere private right. The corporation had conferred on it a public right of partially obstructing the river, which is a common highway, and which obstruction would have been a nuisance, if done without public authority. This special privilege, conferred on the corporation by the sovereign power, of obstructing the navigation, did not belong to the country generally by common right, and is therefore a franchise; and, secondly, the authority of taking tolls from those who crossed the river on the bridge was also a franchise, and freedom to do that which could not be lawfully done by one without public authority; this franchise could only be conferred by the Legislature directly, or indirectly

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*Crevington Drawbridge Company et al. v. Shepherd et al.*

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through public agents and tribunals, in pursuance of a statute. The bridge is part of a road, and an easement, like the road; and the privilege of making the bridge, and taking tolls for the use of the same, is a franchise in which the public have an interest; the corporation, as owner of the franchise, is liable to answer in damages if it refuses to transport individuals on being paid or tendered the usual fare; the law secured the tolls as a recompense for the duty imposed to provide and maintain facilities for accommodating the public. Whether the timbers and materials of this bridge could be sold at auction by the marshal, by virtue of a *fiery facias* in his hands, as was held could be done by the laws of North Carolina in the case of the State *v. Rives*, 5 N. C. R., 297, we are not called on to decide in this case, as here the annual tolls were sold, and not the bridge itself.

By the laws of Indiana, lands and tenements cannot be sold under execution, until the rents and profits thereof for a term not exceeding seven years shall have been first offered for sale at public auction; and if that term, or a less one, will not satisfy the execution, then the debtor's interest or estate in the land may be sold, provided it brings two-thirds of its appraised value. The tolls, under the idea that they were rents and profits of the bridge, were sold for one year, according to the forms of this law. The tolls of the bridge being a franchise, and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide on their own laws, should it become necessary. One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation, (owning no corporate property but this bridge,) unless equity can afford relief.

By the laws of Indiana, stocks in a corporation may be sold



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*Covington Drawbridge Company et al. v. Shepherd et al.*

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by virtue of an execution against the owner of the stocks, which the sheriff may transfer to the purchaser; but this law does not help these complainants; they did not proceed against the stocks; their judgment at law did not affect individual property, but corporate property. The question whether a railroad company's property, including the franchises, can be subjected to the debts of the corporation by a decree in equity, is treated very fully by Redfield on Railways, ch. 32, section 2, p. 571; there the substance of the decisions affecting the doctrine is given in cases where there were liens by mortgage. The subject was well examined by the Supreme Court of Georgia in the case of the Macon and Western Railroad Company v. Parker, 9 Geo. R., 378. The contest there involved claims of creditors. When speaking of the necessity of equity exercising jurisdiction, the court say "that the whole history of equity jurisprudence does not present a case which made the interposition of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of creditors to an insolvent estate as this did." The road was sold according to the decree; but, to settle the difficulty as to the sale of a franchise without the consent of the power granting it, upon application, an act was passed by the Legislature, creating the purchaser and his associates a body corporate, with the powers and privileges of the old company. In England, the practice is, to order a receiver to be appointed to manage the corporate property, take the proceeds of the franchises, and apply them to pay the creditors filing the bill.

Blanchard v. Cawthorn, 4 Simons's R., 566.

Tripp v. The Chard Railway Company, 21 E. Law and E. R., 58.

All that we are called on to decide in this case is, that the court below had power to cause possession to be taken of the bridge; to appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgments at law; and our opinion is, that the power to do so exists, and that it was properly exercised. It is therefore ordered that the decree below be affirmed, and the Circuit Court is directed to proceed to execute its decree.

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*Livermore et al. v. Jenckes et al.*

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Mr. Justice DANIEL dissented, for want of jurisdiction of the courts of the United States over corporations.

Marshall v. Balt. and Ohio R. R. Co., 16 How. Reports.

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**EDWARD M. LIVERMORE AND DAVID B. SEXTON, APPELLANTS, v. THOMAS A. JENCKES, ALEXANDER FARNUM, AND STEPHEN WATERMAN.**

The laws of Rhode Island allow an assignment to be made by a failing debtor, for the benefit of certain preferred creditors, and for the exclusion of those who should refuse to execute releases from their respective claims.

The laws of New York do not permit such assignments.

Where an assignment with the above reservation was made in Rhode Island by a person and to persons residing there, which conveyed to trustees certain property in Rhode Island, and also property in New York, it was proper for the Circuit Court of New York to dismiss a bill filed by creditors residing there, provided there was no fraud in fact in the assignment.

The complainants never acquired nor ever had any lien upon the property in New York, so as to subject it legally or equitably to their demand against the failing debtors, either before or after it was carried into judgment in the Supreme Court of New York.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in equity.

Livermore and Sexton, who filed the bill, were citizens of New York, and Jenckes, Farnum, and Waterman, citizens of Rhode Island.

The complainants claimed to set aside an assignment made on the 19th of April, 1854, by Waterman, to Jenckes & Farnum, upon the ground that the assignment was to enure to such of Waterman's creditors who should sign a release. This provision, it was admitted, was valid by the laws of Rhode Island, where the assignment was executed, but invalid by the laws of New York, where the property in question was situated. Livermore and Sexton had become judgment creditors after the assignment was made; and if it could be set aside, the property would be open to execution upon their judgments.

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*Livermore et al. v. Jenckes et al.*

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The defendants all answered the bill, and much evidence was taken. After the cause was heard upon the pleadings and proofs, the Circuit Court passed the following decree:

"This cause having been heretofore brought on to be heard at final hearing on pleadings and proofs, and having been argued by Mr. A. J. Willard on the part of the plaintiffs, and by Mr. T. A. Jenckes and Mr. C. A. Seward on the part of the defendants, now, on consideration thereof, it is found and decided by the court, that the property in the State of New York, assigned by the defendant Waterman to the defendants Jenckes & Farnum, by the assignment mentioned in the pleadings herein, was taken into possession by said assignees, and converted into money, and the proceeds transferred to the State of Rhode Island, prior to the filing of the bill in this cause, and that the plaintiffs have no lien on said property, and that there was no fraud in fact in the making of said assignment; and it is therefore ordered, adjudged, and decreed, that the bill in this cause be and the same is hereby dismissed, with costs to the defendants against the plaintiffs to be taxed, and that the defendants have execution against the plaintiffs for such costs, according to the course and practice of this court."

The complainants appealed from this decree.

The cause was submitted on printed arguments by *Mr. Morrell* for the appellants, and *Mr. Jenckes* and *Mr. Clarence A. Seward* for the appellees.

The arguments upon both sides covered a great deal of ground.

It will be seen by the decree above recited, which was affirmed by this court, that the broad question of whether the law of Rhode Island or that of New York should govern, was not decided by either court, but that the decree was founded upon the three following circumstances:

1. That the property was converted into money, and transferred to Rhode Island.
2. That the plaintiffs had no lien on the property.

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*Livermore et al. v. Jenckes et al.*

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3. That there was no fraud in fact in the assignment.

In noticing the arguments upon the general proposition, whether the *lex loci contractus* or the *lex fori* should govern, the reporter can give only an outline.

The first point of *Mr. Morrell* was the following, viz:

FIRST POINT.—The Circuit Court erred in not deciding that the assignment from Waterman to Jenckes & Farnum was fraudulent and void as affecting the complainants below, and the other creditors of Waterman residing within the State of New York at the time of the assignment, so far at least as the assignment affected the estate of the assignor within the State of New York, at the time of its execution and delivery.

As it regards the invalidity of the assignment, the essential facts are briefly as follows:

Waterman being insolvent, and indebted, among others, to the complainants, and holding property and choses in action in the State of New York, assigned to J. & F., giving certain preferences, and directing the residue to be paid to such of his creditors at large as should release their demands within six months, reserving to himself the dividends of such creditors as should refuse to release.

We contend that such an assignment is adjudged fraudulent as to creditors, by the laws of the State of New York. That, as to property situated within the State of New York and the claims of resident creditors, the laws of the State of New York are paramount, and do not yield to the laws of the domicile of the debtor.

*First.* This case is one of State jurisdiction. It has arisen out of the conflict of the laws of the States of New York and Rhode Island. These laws relate to matters of internal administration, over which Congress, under the Constitution, has no control whatever. The States have not seen fit to lodge in Congress power to harmonize the conflict of their internal systems. Such a power, if lodged in the Federal Government, would necessarily involve the right to carry the laws and systems of polity prevailing in one State within the territorial limits of another. It would aim a blow at the integrity of the State sovereignties. Whatever may be thought of the neces-

sity or wisdom of such an accession of authority to the Union, it is undisputed that no such grant has been made by the Federal Constitution.

Story's Conflict of Laws, sec. 18.

Previous to the Constitution, the States possessed the absolute dominion common to all independent sovereigns over all persons and property within their territorial limits. They determined for themselves the laws by which real and personal property within their limits should be held and transmitted. If they recognised the dispositions of property made by foreign States, it was on a principle of comity alone, and not an acknowledgment of any inherent vitality in the laws of the foreign State within their own territories.

That body of opinion called the law of nations had no practical existence or positive efficacy, except so far as it had become embodied in and formed a part of some local system of laws.

The Constitution created the Federal sovereignty, and invested it with certain specified powers; but neither by express grant nor by necessary implication has the power been conferred to communicate vitality to the laws of one State within the limits of another.

Wherever it was deemed desirable that a harmonious system should exist throughout the Union in regard to a particular subject, the Constitution, in regard to that subject, conferred supreme legislative power on Congress, in some instances excluding the States from all legislative control over the subject, and in others permitting local legislation to a certain extent, but subordinating it to the paramount authority of Congress.

The power vested in Congress to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, is an instance of this kind.

The system of laws adopted by Congress in such cases displace State legislation on the same subjects altogether. It was no part of the intent of the Constitution that Congress should leave the conflicting laws of the States in such cases in force, and adopt merely a system of rules by which the conflict arising out of these jarring provisions should be determined.

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*Livermore et al. v. Jenckes et al.*

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Such a principle would blend the national and local legislation into an inextricable maze. It would be impossible to define the limits of either. The line of demarcation once destroyed, the stronger of the antagonistic powers would gradually absorb the weaker, and the balance of the Union ultimately be destroyed.

It is not necessary to consider whether the power granted to Congress in regard to the establishment of bankrupt laws could be so exercised as to make the disposition of the estates of insolvents depend wholly and exclusively on the laws of Congress. Until Congress exercises the power, no such question can arise. The defendants rest their case upon the authority of the laws of the State of Rhode Island, and not upon those of Congress.

The power, then, of determining what disposition may be made by insolvents of their property within the State of New York, rests with that State to determine, free from any control in Congress, under existing laws.

If Congress cannot define a system of rules to determine controversies growing out of the conflict of the laws of the States, it is clear that the Federal courts cannot, independently of the States, compose and enforce such a system.

The adjudications of the Federal courts must, in every instance, rest upon the express or the implied authority of either the National or State Legislatures.

The language used by Mr. Justice Grier in *Caskie v. Webster* (2 Wallace, jun., 131) would, on a cursory examination, appear to imply that it was a part of the duty of the Federal courts to apply to controversies of this character a sort of modified *jus gentium*, adapted to harmonize with the objects and purposes of the Union of the States. He says: "We do not think that the different States of this Union are to be regarded, as a general thing, in the relation of States foreign to each other; especially ought they not to be so regarded in regard to questions relating to the commerce of the country, which is co-extensive with the whole land, and belongs, not to the States, but to the Union." A careful examination of that case will show that such was not his intent.

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*Livermore et al. v. Jenckes et al.*

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The question in that case was as to the validity, in Pennsylvania, of an assignment valid by the laws of Virginia, where it was made, in its operation upon property situated in Pennsylvania. We shall see hereafter that the case was decided in strict conformity with the laws of the State of Pennsylvania, and that the principle above cited was intended as an exposition of the liberal rules that governed the State of Pennsylvania in questions arising out of the conflict of her laws with those of other States.

The present controversy originated in the Supreme Court of the State of New York, which court had jurisdiction, not only of the subject-matter, but of the parties who had been served with process. It has been removed into this court merely in consequence of the parties being residents of different States.

This court must therefore give the same judgment which the courts of the State of New York would have been bound to give, had they adjudicated the case.

See the remarks of Chief Justice Marshall in *Elmendorf v. Taylor*, 10 Wheaton, 159.

*Second.* By the laws of the State of New York, an insolvent's assignment, containing the clause requiring creditors to release or forfeit their dividends, and directing them to be paid in that case to the assignor, is fraudulent as to creditors, and is void.

The Revised Statutes re-enact the statute of 13 Eliz., which is an affirmance of the common law.

*Third.* The assignment being of a nature forbidden by the laws of New York, according to the acknowledged principles governing the jurisprudence of that State, it cannot be asserted there as affecting property within that State, and as against a creditor of the assignor there resident.

We do not find that the precise point in question has been adjudicated in that State, but the principles governing the case are well settled.

[Mr. Morrell then examined the following cases: 2 Mason, 157; 12 Wheaton, 259; Ware, 282; 5 Greenl., 245; 19 Wendell, 15; 8 Dallas 875, note; 14 Martin, 98, 102; Conflict

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*Tinmore et al. v. Jencks et al.*

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of Laws, sec. 390; 4 Term Reps., 192; 5 East., *Potter v. Brown.*]

These authorities go as far as authority can go to establish the principle, that it is not only within the power, but it is the duty, of a State to deny to strangers privileges not permitted to its own citizens. The wisdom of such a rule can find no better illustration than the present case. Waterman establishes himself in business in the State of New York, contracts debts due to its citizens, until, finding himself insolvent, he returns to the State of Rhode Island, and there executes an assignment, which, if executed in this State, would have been adjudged fraudulent as against his creditors. If the State of New York should allow so unequal a privilege to strangers, would she not be justly chargeable with neglecting the interests of her own citizens? Would it not, in the language of Judge Ware, be equivalent to surrendering her independence?

Such a doctrine would give rise to great abuses. A citizen of New York, in failing circumstances, wishing to make a disposition of his property forbidden by the laws of his own State, but permitted by another, could, by taking up a residence in the latter State, successfully evade the laws of his State.

There is another view of this case still more conclusive. The law of the State of New York, which in the present instance is in conflict with the laws of Rhode Island, is a part of the insolvent system of the State. The greatest diversity exists between the insolvent systems of the different States and foreign countries; all, however, recognise, in greater or less degree, the right of the State to assume the disposition of the estates of insolvents. In some countries, the system is coercive; in others, voluntary; and in some, a mixture of both; but all unite in limiting the power of the insolvent in regard to the absolute disposition of his estate. The laws which have relation to the estates of insolvents, and tend to prevent the unequal or unjust dispositions of such estates, are a part of the insolvent system of the State.

Whatever relates to the insolvent system of the State depends exclusively upon the *lex fori*.



If the insolvent or bankrupt laws of a foreign country or State are not permitted to have any extra-territorial efficacy, for the reason that every State must determine for itself the best mode of administering the estates of insolvents, with how much more reason should we refuse to permit a citizen of a foreign State voluntarily to make such a disposition of his property in this State, at variance with our insolvent laws?

The cases of insolvency and of administration are similar in principle in this respect.

Let us now consider the decisions that have been made on this subject in sister States :

[Mr. Morrell then examined the following cases :

Massachusetts : 18 Mass., 146 ; 6 Pick., 286 ; 19 Pick., 281 ; 15 Pick., 11 ; 19 Pick., 105.

Connecticut : 14 Conn., 555 ; 9 Conn., 487.

New Jersey : 1 Green, 326.

Missouri : 6 Missouri, 302.

Pennsylvania : The precise point does not appear to be adjudicated, although there are floating dicta adverse to the principle contended for. 8 Harris, 91 ; 6 Harris, 185 ; *Caskie v. Webster*, Wallace, jun.

Maryland : 7 Gill, 446, where the court states the condition of the question upon the State authorities at that time (1848-'9) to be as follows :

The States which had determined against the validity of the releasing clause were stated to be New York, Ohio, North Carolina, Mississippi, Missouri, Alabama, Connecticut, and Illinois.

In favor of the validity, Pennsylvania, Virginia, South Carolina, Massachusetts, New Hampshire, and Maine.

Virginia : 8 Grattan, 457.

Since the decision in *Abbert v. Winn*, New Jersey has assented to the States holding such assignments void.

*Varnum v. Campbell*, 1 Green, 326.

Rhode Island should be added to the States sustaining the clause. At the present time, the States whose systems of jurisprudence forbid such clauses are New York, Ohio, North Carolina, Mississippi, Missouri, Alabama, Connecticut, Illinois,

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*Livermore et al. v. Jenckes et al.*

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Pennsylvania, New Hampshire, Maine, Maryland, and New Jersey.

On the other side stand Rhode Island and South Carolina, side by side. Virginia is bound, contrary to the opinions of her jurist, to an erroneous course of decision, and thus, on a question of authority, throws her weight against, rather than in favor of, the Rhode Island and South Carolina doctrine.]

SECOND POINT.—The assignment to J. & F. being void by the laws of the State of New York, the appellants were entitled to a decree in the court below for an account of the property, or the proceeds thereof, which came into the assignee's hands from the State of New York, such being the remedy allowed by the State of New York, and, consequently, the appropriate remedy to be allowed under their bill.

*First.* In a case arising exclusively under the laws of the States, and where the Circuit Court obtains jurisdiction solely through the residence of the parties to the controversy, the *lex fori* is carried into the Circuit Court with the case, and the same remedy is to be allowed, which, by the *lex fori*, is appropriate to the case.

*Second.* Had this case been carried to a decree in the New York courts, the appellants would have been entitled to an account against the assignees, as above stated. There are two remedies allowed in the courts of equity of that State to a judgment creditor, for the purpose of reaching the estate of his debtor, and applying it in satisfaction of his judgment.

[The other subdivisions are necessarily omitted.]

IV. The conveyance of the proceeds of this sale into the State of Rhode Island does not relieve the assignees from liability to the New York creditors.

The removal of the assigned estate beyond the jurisdiction of the courts of the State of New York was in itself an act of bad faith. If the act of Waterman in assigning was an illegal act, that of the assignees in carrying the assets of the estate to Rhode Island was equally illegal. How, then, can the assignees shelter themselves behind an act of wrong? They say that the claims of other creditors have attached to the fund; if so, it is through their wrong that the complainants have lost their remedy.

It is quite clear that this would have been no justification, had the assignees been citizens of the State of New York; nor can their citizenship of Rhode Island protect them in New York for an act of wrongful intermeddling with the estate of an insolvent in New York, in fraud of New York creditors.

It is not alleged by the respondents, that, previous to the filing of the bill, they had received of Hill, Carpenter, & Co., more than the notes representing  $33\frac{1}{2}$  per cent. of the appraised value of the property appertaining to the mill. The presumption is, that the balance had not been paid. The presumption is, also, that the property transferred to Hill, Carpenter, & Co., consisting of the machinery, goods, and stock, at the Owasco Mills, Auburn, New York, remained in that State until the filing of the bill. These presumptions are not repelled by either allegation or proof to the contrary.

The sale to Hill, Carpenter, & Co., being, as we have seen, colorable, the property remained in the assignees, and must be presumed so to have remained at the filing of the appellant's bill.

V. The supposed equities of Rhode Island creditors, arising from the pretended transfer to that State, offer no proper answer to the appellant's demand of a decree.

The counsel for the appellees made the following points, which the reporter is obliged to give, without the arguments to sustain them.

POINT FIRST.—The assignment was valid *inter partes*, and the assignees legally acquired, and legally translated to Rhode Island, the property covered by it.

1. The assignment was valid *lege loci*. (See Point IV, 2, b.)
2. It was also valid by the law of the State of New York, until its invalidity had been judicially declared.
3. The action of the assignees in reducing the property to their possession, and removing it prior to such judicial declaration, cannot be impeached.

Henriques v. Hone, 2 Edwards Ch. R., 120.

Mills v. Argall, 6 Paige, 577.

Porter v. Williams, 5 Selden, 149, and cases there cited.

Averill v. Loucks, 6 Barb. S. C. R., 477.

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*Livermore et al. v. Jenckes et al.*

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POINT SECOND.—The appellants had not, at the time of filing their bill, acquired that lien upon the estate which is an indispensable prerequisite to the granting of the relief sought.

POINT THIRD.—The relief sought by the appellants cannot be granted consistently with the rights of other creditors of Waterman, who are not now before the court.

POINT FOURTH.—A conflict between the *lex fori* and the *lex loci* does not necessarily or properly arise. The important element of a *conflict of lien* is wanting. The *lex fori* can operate upon the persons only of the defendants; the property, the subject-matter of the controversy, is not within its jurisdiction.

It is only in cases of rival claimants to property within the jurisdiction of the *lex fori* that such a conflict can arise.

But if the question of the construction of the assignment is necessarily before the court, then, both upon principle and authority, it should sustain the assignment.

I. The question is one of law, and not of fact. By the Revised Statutes of the State of New York, (2 R. S., 138, sec. 4.) the question of fraud in an assignment is a question of fact, and, as such, is to be decided, first upon the evidence, and secondly by the language of the instrument.

a. The question of fraud in fact does not arise. The bill is verified, and calls for an answer under oath. The answers are fully responsive to all the charges of fraud alleged in the bill, and, so far as they are responsive, are evidence for the defendants, to be taken as absolutely true, because not disproved.

*Hough v. Richardson*, 3 Story, 692.

*Landon v. Goddard*, 2 ib., 267.

b. When the question to be decided arises upon the language of the assignment, the question becomes one of law rather than of fact. Its answer determines the legal construction or effect of the instrument.

*Cunningham v. Freeborn*, 3 Paige, 557.

*Sheldon v. Dodge*, 4 Denio, 217.

*Goodrich v. Downs*, 6 Hill, 438.

II. The single question then presented for the decision of the court is: Is this assignment, upon its face, valid or fraudulent, within the State of New York? It must be borne in mind—

*Livermore et al. v. Jenckes et al.*

1. That the assignor and the assignees were neither citizens of nor residents in New York. They were citizens of Rhode Island, and residents of Providence.

2. That the assignment was not executed in New York, but was executed in Rhode Island, the domicile of the parties.

3. That by the laws of Rhode Island it is valid.

4. That it operated upon personal property only in the State of New York.

5. That the personal property is not within the jurisdiction of the *lex fori*.

6. That the parties proposing the question have no lien upon the property.

a. Personal property has no locality. It follows the law of the person. The disposition and transmission of it, either by succession or the act of the owner, are subject to that law. It cannot be legally acquired by another without the actual or constructive assent of its owner—actual, if he voluntarily surrenders it; constructive, when the law deprives him of it by a proceeding to which he is an indispensable party. Unless he is thus made a party, his title to his property cannot be divested. The law, therefore, can only reach his property through him.

Sill v. Worswick, 1 H. Bl., 690.

Pipon v. Pipon, Amb., 25.

Hence it follows that a transfer of property by its owner, whether *inter vivos* or *post mortem*, valid by the law of his domicile, will, if made before the law of another country has actually attached upon the property by a proceeding against its owner, be esteemed valid within every other jurisdiction where the property may be. (Story on Conflict of Laws, secs. 380, 383, 384.) The law of the domicile regulates the succession to and the distribution of the personal property of the intestate. (Ib.; Holmes v. Remsen, 20 Johns., 267.) He has a right to make a valid distribution of it *ante mortem*, and the same right to rely upon the law of the domicile as sanctioning that distribution, that his administrator would have as sanctioning a distribution *post mortem*. The right to the protection of the law of the domicile arises from the residence of the

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*Livermore et al. v. Jenckes et al.*

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owner of the property, not from his decease. If, then, the assignment is valid by the *lex domicilii* and by the *lex loci contractus*, it operated to pass a legal title to the assignees to the personal property in the State of New York.

b. The assignment is valid in Rhode Island. This is proved by the answer of the assignees, and by the decisions of the courts of that State.

Stewart v. Spencer, 1 Curtis R., 157.

Dockerry v. Dockerry, 2 R. I. Rep., 547.

Haydock v. Stanhope, 1 Curtis R., 471.

c. This court should interpret the assignment as it would be interpreted by the courts of Rhode Island, not only in compliance with authority, nor upon principles of comity only, but upon principles of justice. Contracts are to be interpreted by the *lex loci* to which the parties had reference when the contract was made. The integrity of the instrument where, as here, there is no fraud in fact, is to be tried by the law of the place of its execution. The universality of this rule, and its every-day application, render, in the case of an ordinary instrument, citations of authority unnecessary. Authority, however, is not wanting to show that the rule is equally applicable to the construction of voluntary assignments. In *Brahear v. West*, 7 Peters, 608, the assignment was made in Pennsylvania, and was attached in Kentucky, because it contained, among other things, a stipulation for a release by the creditors. Marshall, C. J., in his opinion, said: "But whatever may be the intrinsic weight of the objection, it seems not to have prevailed in the courts of Pennsylvania. The construction which the courts of that State have put upon the Pennsylvania statute of frauds must be received in the courts of the United States." So, also, in the case of *Dundas v. Bowler*, 3 McLean, 397, Mr. Justice McLean says: "The assignment, having been made in Pennsylvania, is governed by the laws of that State." And so this point is not open for discussion. The rule is too well established to be now shaken or disturbed.

Speed v. May, 17 Penn. St. Rep., 5 Harris, 91.

Adams v. Storey, 1 Paine's C. C. Rep., 100.

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*Livermore et al. v. Jenckes et al.*

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*Bank of Augusta v. Earle*, 13 Peters, 519.

*Rainsdyke v. Kane*, 1 Gall., 371.

*Leroy v. Crowninshield*, 2 Mason, 151.

d. If, therefore, this court shall construe the assignment as it would be interpreted in Rhode Island, it should affirm its validity, and protect the assignees in their possession of the property against the claims of the plaintiffs in this suit. The question of the construction of the assignment is not embarrassed by the presence of fraud in fact in its execution. The evidence and the decision of the court below are conclusive upon this point. The only remaining question, therefore, is upon the interpretation of the instrument itself, without reference to evidence, either of the acts of the parties or to the statute of Elizabeth as re-enacted in New York. That re-enactment makes the question of fraud in an assignment a question of fact; and, inasmuch as that fact is, upon the evidence, and upon the decision of the court below, eliminated from the case, the only possible question remaining is, by what law shall the assignment be interpreted?

1. In England, effect is given to the claims of foreign assignees as against creditors resident there, and this, whether the assignment be involuntary or *in invitum*.

Locke on Foreign Attachments, 36.

*Sill v. Worswick*, 1 H. Bl., 390.

Story on Conflict of Laws, secs. 408, 409.

2. The rule is not recognised to an equal extent in the United States. A distinction obtains here between bankruptcy *in invitum* and a voluntary assignment. Any extra-territorial effect is almost universally denied to an assignment made compulsorily under foreign bankrupt laws, while, to an assignment voluntarily made, *ex mero motu*, by a failing debtor, effect is or is not given, as the authorities of each particular State may require. These authorities are of course numerous, and, it is to be admitted, conflicting. Numerically, they uphold the assignment, and, in so doing, support the elementary principle already stated, and affirm the justness of the law which accords to a failing debtor the right to make such legal disposition of his property among his creditors as he may elect.

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*Livermore et al. v. Jenckes et al.*

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The rule sustaining the *lex domicilii* and the assignment, to which all the authorities refer, is thus stated by *Story* in his *Conflict of Laws*, sec. 111: "It is therefore admitted that a voluntary assignment by a party, made according to the law of his domicil, will pass the personal estate, whatever may be its locality, abroad as well as at home." The distinction is also alluded to in the case of *The Watchman*, Ware, 240: "The law separates that which is derived from the public power from that which comes from the will of the party. Tried by this principle, if the assignment of the debtor in the present case is valid in Massachusetts, it is valid everywhere, and operated a transfer of his property wherever situated, for the transfer was made by the simple will of the owner, and not by virtue of the public power, as in the case of bankruptcy."

The counsel then cited the following authorities:

New Hampshire: *Sanders v. Williams*, 5 N. H. Rep., 218; *Sauderson v. Berford*, 10 N. H., 260.

New Jersey: *Frazier v. Fredericks*, 4 Zab., 162.

Massachusetts: 19 Pick., 105, where an assignment was held valid, notwithstanding the courts of Maine, in *Fox v. Adams*, (5 Greenleaf, 245,) had decided that an assignment in Massachusetts did not debar a Maine creditor from attaching property of the estate in Maine.

Connecticut: *Atwood v. Protection Insurance Company*, 14 Conn., 555.

New York: *Holmes v. Remsen*, 4 John. Ch. Rep., 460; *Same v. Same*, 20 John. Rep., 266; 8 Wend., 566; 23 Wend., 87, following Judge Platt's decision, but recognising the distinction between voluntary and involuntary bankruptcy; 8 Sandford S. C. R., 316; 1 Selden, 353; unreported case of *Carnley v. Tuckerman*, N. Y. Sp. Tr. 1 Judicial District.

Pennsylvania: *Milne v. Morton*, 6 Binney, 353; *Speed v. May*, 17 Penn. St. Rep., 5 Harris, 91; *Law v. Mills*, 6 Harris, 186.

South Carolina: *Green v. Mowry*, 2 Bailey, 163.

Louisiana: *The U. S. v. Bank U. S.*, 8 Rob. L. Rep., 262, 413; *Richardson v. Leavitt*, 1 Lou. Am. Rep., 430.



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*Livermore et al. v. Jenckes et al.*

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Wisconsin: 6 Law Register, 737.

Courts of the United States: The Watchman, Ware, 282, the court felt constrained to carry out the doctrine in *Fox v. Adams*, 5 Greenleaf, 245; 3 McLean, 397; *Caskie v. Webster*, 2 Wallace, 182.

Supreme Court of the U. S.: 12 Wheat., 213, where the court recognises the doctrine in 5 Cranch, 298; 7 Peters, 608; 13 Peters, 519; 8 Howard, 483.

None of the authorities cited by the appellants authorize the granting of the relief prayed for by them. *Ingraham v. Geyer* (13 Mass., 146) turned upon the point that the attaching "creditor had actually seized the debt before it was paid over to the assignees." As the complainants here have no lien, the principle of this decision, if there be any in it, does not apply. *Blake v. Williams*, 6 Pick., 285, reaffirmed the distinction between voluntary assignments and those made *in invitum*, and decided nothing beyond such reaffirmance. The court, commenting upon *Ingraham v. Geyer*, says that a decision against the operation of an assignment *in invitum* does not draw after it the inference that an assignment made by the debtor himself, lawful in the place where made, would be unavailing. And the case of *Le Chevalier v. Lynch* (Doug., 161) affirms the necessity of an attachment before the assignees have acquired possession. *The Fall River Works v. Croade* (15 Pick., 11) decides, that if creditors elect to become parties to the assignment, and their debts amount to as much as the assigned property, this will complete the intended consideration, render the conveyance effectual even against other creditors, and vest in the assignees the whole property. This rests upon the principle that an insolvent debtor has a legal right to convey his estate to whom he pleases for a valuable consideration, although it may benefit some and prejudice others of his creditors. The answer of the assignees states that, with one exception, all the creditors of *Waterman* residing in Rhode Island, and many of the creditors residing out of that State and in New York and elsewhere, have complied with the conditions of said assignment, and become parties thereto by releasing *Waterman*; and that the claims of such releasing cred-

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*Livermore et al. v. Jenckes et al.*

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itors, and the dividends to which they are entitled, far exceed in amount the sum which the said assignees now hold, and the claims also exceed the value of all the assets of the assigned estate.

Varnum v. Camp (1 Green, 326) recognises the necessity of a positive law to defeat the assignment, and relies upon the statute of New Jersey, which declares an assignment like the one in that case to be absolutely void. The statute of New York vitiates an assignment for fraud only, and leaves the instrument valid *inter partes* until declared void. There is no fraud in fact in this case, and no "positive statute law" like that of New Jersey, and so the assignment is good, unless avoided for fraud in law, necessarily to be presumed from its language. This cannot be presumed in this case, because the instrument is to be interpreted *lege loci*, and by that law it is valid.

In the case of Fox v. Adams, (5 Greenleaf, 245,) the first point decided by the court is, that the debt sought to be trusted had not passed to the assignees under the assignment, and all the law of the case adverse to the defendants here is disposed of in a paragraph of a dozen lines, and solely upon the authority of Ingraham v. Geyer.

Brown v. Knox (6 Mo., 302) decides nothing upon principle, and refers to no previous authority. The case is eminently unsatisfactory, from the absence of any reason for the decision of the court. In this case, also, the property was in Missouri, and was attached by the plaintiff.

Breine v. Patten, (17 La. Rep.,) as explained by the case of the United States v. The Bank U. S., (*supra*,) turned upon two points: First. It did not appear that the assignment was valid *lege loci*. Second. It was not clear that the property was in the possession of the assignees.

The examination of all these cases discloses:

*First.* That in no case have the claims of the assignees been disregarded, when the property covered by the assignment has become vested in them, and they have transmitted it beyond the jurisdiction of the court whose aid is invoked by the attaching creditor, before he has acquired any lien upon it.

*Second.* That when the assignment is proved to be valid by the *lex loci*, principle and the weight of authority require that it should be sustained; the cases refusing to sustain it proceeding rather upon the ability of the court to make the decision, than upon the general principle before cited, or in conformity with the weight of previous adjudication.

POINT FIFTH.—Our argument has thus far proceeded upon the ground that the presence of the stipulation for a release in the assignment *ipso facto* rendered the instrument void. But it is not intended to be conceded that such is the effect of that stipulation.

1. The English cases do not hold such an assignment void. *Jackson v. Lomas*, 4 T. R., 166.

*The King v. Watson*, 3 Price, 6.

2. There is a conflict in the decisions of the local courts of the several States, as to the effect upon an assignment of a clause requiring a release.

In Massachusetts, New Hampshire, (*Hawes v. Richardson*, 5 N. H., 118, before the statute of that State,) Pennsylvania, Virginia, South Carolina, Alabama, and Rhode Island, the assignment is held valid; and in New York, Ohio, Missouri, Connecticut, Maine, and Illinois, it is held to be void. (1 Am. Lead. Cas., 94, 95, and cases there cited.)

In *Pierrepont v. Graham*, (4 Wash. C. C. R., 232,) the assignment was upheld, and the decision in this case was followed by Judge Story in *Halsey v. Whitney*, (4 Mason, 206;) and in the case of *Brashear v. West*, (7 Peters, 608,) where the assignment excluded from the benefit of its provisions all creditors who should not within ninety days execute a release, the court, after stating the many reasons why such a stipulation is not *per se* evidence of an intent to hinder, delay, and defraud creditors, and how inefficacious it would be if such were the intent, decide, as we have already shown, that the construction which the courts of the State in which the assignment was made have given to the instrument must govern the construction to be given to it by the courts of the United States.

3. If, therefore, looking at it as an original question, the court is satisfied that the assignment is not upon its face void,

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*Livermore et al. v. Jenckes et al.*

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it must, in the absence of evidence of fraud in fact, affirm its validity; but if, on the other hand, the court is of opinion that the question of the construction of the assignment is not an open question, but is to be decided by reference to local law, the court then must follow the decision in *Brashear v. West*, and adopt the construction given by the courts of Rhode Island, and thus, also, the assignment must be sustained.

Mr. Justice WAYNE delivered the opinion of the court.

This bill was filed by the appellants in the Circuit Court of the United States for the southern district of New York, as judgment creditors of the respondents, Waterman & Samuel Harris, to avoid an assignment made by Waterman to the respondents, Jenckes & Farnum, in trust for the payment of the creditors of Harris & Waterman, and of Waterman individually.

The appellants seek to avoid the assignment, on the ground that it was voidable, from its tending to hinder, delay, and defraud creditors; because there is a reservation in it to the assignee of the dividends of such creditors as should refuse to become parties to it, and to release their demands in consideration of the dividends they might receive. It appears that a large amount of the property conveyed was in the State of New York; that the appellants resided there, and that they were then creditors of Harris & Waterman. The trusts in the deed were, first, to pay the expenses of the assignment; secondly, to pay the debts of several preferred creditors of Harris & Waterman, and of Waterman individually; and, thirdly, to pay all the residue of the debts of Waterman individually, and as a member of the firm of Harris & Waterman. The assignment contained the following proviso: "Provided, That none of my said creditors named in the third class of this assignment shall be entitled to receive any dividend or benefit under the deed of assignment, unless they shall execute and deliver to my said assignee, within six months from the date hereof, a full release and discharge, under seal, of all their claims and demands against me, the assignor; but the dividends on the claims and demands of the creditors who shall not execute

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*Lieermore et al. v. Jenckes et al.*

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such release shall be paid over to me, the said assignor, or to such person as I shall appoint."

It appears that Harris, the copartner of Waterman, had given to the latter a bill of sale of all their partnership property; that the firm was then dissolved; that Waterman had the possession of it, and that he afterwards made the deed of assignment to Jenckes & Farnum. Now, Jenckes & Farnum received and held the property under the assignment, as well that which was in New York as all that was elsewhere. A part of the copartnership property was the Owasca Lake mill, situated at Auburn, Cayuga county, State of New York, and it is admitted that it exceeded in value the debt due by Harris & Waterman to the complainants. As to that property, James Fitton was a copartner; but it appears that he joined with Harris & Waterman in dissolving the copartnership, and in authorizing Waterman to "settle up" its business, having on the same day agreed that Harris should convey to Waterman the bond and mortgage which he had given to Harris & Waterman for the purchase-money due by him for an undivided fourth part of the Owasca Lake mill. Thus Waterman was made the sole owner of it. He supposed himself at that time to be solvent, and that he could carry on the business of the mill, and worked it for some time; but finding himself unable to do so, he conveyed it to Jenckes & Farnum, with all the other property of the late concern which had become his, with the intention that they should, as his assignees, make an equitable distribution of it among his creditors; and, in his answer to the bill of the complainants, he declares he did so without any fraudulent intent to hinder, delay, or defraud creditors. Waterman had been, was then, and was when he made the assignment, a citizen of the State of Rhode Island. The property assigned was in different States. Jenckes & Farnum accepted the trusts of the assignment. Waterman ceased to have any control over it, and, for aught that appears, the assignees have executed their trust unimpeachably. After the assignment was made, the complainants obtained, in the Supreme Court of New York, a judgment upon their demand against Harris & Waterman.

They have now brought their bill as judgment creditors

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*Barreda et al. v. Silsbee et al.*

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against Waterman and Jenckes & Farnum, the assignees, to avoid the assignment; alleging that they have a lien upon the property in New York, or its proceeds, as creditors of Harris & Waterman, because Waterman's assignment to Jenckes & Farnum contained a reservation to the assignor, which, by the laws of New York, was fraudulent. And so it would have been, had the assignment been made in that State, by persons residing there. But the assignment was made in the State of Rhode Island, by a person and to persons residing there, and is in every particular just such a one as, by the laws of that State, merchants and others in failing circumstances, residing there, are allowed to make in favor of creditors within that State and those residing elsewhere, wherever the property of the assignor may be. We see no cause for thinking it was fraudulently made. The respondents deny it upon their oaths, as responsively to the charge made by the complainants as that can be done. The latter have not sustained their charge by any proof whatever. For that cause alone, if there was no other, we should concur with the circuit judge in the decree given by him in this case. And we also concur with him, that the complainants never acquired nor ever had any lien upon the property in New York, so as to subject it legally or equitably to their demand against Harris & Waterman, either before or after it was carried into judgment in the Supreme Court of New York. Deeming the grounds stated decisive of this controversy, we abstain from a discussion of other points learnedly and ably argued by the counsel in the cause in their respective printed briefs. They were appropriate to the cause, but we do not deem them necessary for the decision of it.

We direct the affirmance of the decree given in the court below.

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**FREDERICK L. BARREDA AND PHILIP BARREDA, PLAINTIFFS IN ERROR, v. BENJAMIN H. SILSBEE, JOHN H. SILSBEE, BENJAMIN W. STONE, WILLIAM STONE, GEORGE T. SANDERS, AND WILLIAM D. PICKMAN.**

Where a vessel was chartered to bring a cargo of guano from the Chincha Islands to the United States, at the rate of twenty-five dollars per ton freight, with a

*Barreda et al. v. Silsbee et al.*

stipulation that the ship should be entitled to any advance in the guano freight made by the charterers, and they subsequently chartered vessels to go from the United States for guano, (reserving certain privileges to the charterers,) at the rate of thirty dollars per ton freight, it was proper for the Circuit Court to leave it to the jury to say, from all the evidence in the case, whether or not the real contract in the last charters was to bring home guano at the rate of thirty dollars per ton freight.

Contingent agreements between merchants and ship-owners ought to receive a reasonable construction, so as to carry their intentions into effect, and, in general, those intentions must be gathered from the language employed, the surrounding circumstances, and the subject-matter.

The case of *Gether v. Capper*, 80 Eng. C. L., examined.

The declarations and statements of the agents of the charterers, made at the time of the execution of the subsequent charters above mentioned, were properly admitted in evidence as part of the *res gestae*, and to show that the charterers were acting in bad faith towards the owners of the vessel which was first chartered.

Where the effect of a written agreement, collaterally introduced as evidence, depends not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury.

Moreover, the fact whether or not the charterers had paid thirty dollars per ton freight might have been proved by oral as well as written evidence.

The authorities examined.

Although the contracts between the charterers and the last owners might have been fair as between themselves, yet, if their effect was to work an unfairness to the first owners, parol evidence was admissible to show it.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

On the 11th of April, 1854, a charter-party was executed by B. H. Silsbee, acting owner of the ship *Shirley*, and F. L. Barreda & Brother, residing in Baltimore, acting as agents for the Peruvian Government. The charter-party provided that the ship should "proceed to Callao, from Australia, where she is at present bound," and take in a cargo of guano at the Chincha Islands. The freight to be paid was at the rate of twenty-five dollars in full per ton of 20 cwt. net, guano, custom-house weight.

At the conclusion of the charter-party, there was the following stipulation:

"The ship to have the benefit of any advance on the guano freights made by the charterers in the United States before

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*Barreda et al. v. Silbee et al.*

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she finishes loading at the islands. It is understood the ship is to be laden as deep as prudent, without regard to the clause restricting her to one-third above her register tonnage."

The principal question in the case was upon the construction of this clause, and whether chartering other vessels, under the circumstances mentioned in the opinion of the court, brought the case of the Shirley within its operation.

The opinion of the court also contains the instructions given by the Circuit Court to the jury, together with the exception to evidence.

The case was argued by *Mr. Wallis* and *Mr. Nelson* for the plaintiffs in error, and by *Mr. Brune* and *Mr. Johnson* for the defendants in error.

At the trial in the court below, both parties, plaintiffs and defendants, applied to the court for instructions to the jury; but the court rejected those offered on both sides, and gave instructions of its own. In the argument here, all these propositions were necessarily discussed, and it would not be possible to report these arguments without stating also the prayers to the court below, which it is not considered necessary to do. But the exception to the admissibility of the parol testimony stands in a different situation, and, with respect to that, the points made by the respective counsel were as follows:

For the plaintiffs in error, it was contended:

3. That parol evidence was not admissible to affect the construction of the subsequent charters in question, or to show any intentions or views of the plaintiffs in error and the other contracting parties in making them, because it is not pretended, and there is no evidence professing to show, that there was any outside contract or understanding in reference to any one of them, varying or qualifying the written stipulations in any way, or that any intentions or views of the plaintiffs in error, or of the other parties, were embodied or carried out otherwise than in and through the writings themselves, by which, and which only, all parties agreed to be and held themselves bound.



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*Barreda et al. v. Silbee et al.*

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This point was in conflict with the court's second instruction, and was raised by the sixth prayer of the plaintiffs in error.

*Shankland v. The Corporation of Washington*, 5 Peters, 894.

*Sprigg v. Bank of Mt. Pleasant*, 14 Peters, 200.

*Selden v. Myers*, 20 Howard, 509.

4. That even if parol evidence had been admissible at all, under the circumstances stated in the preceding point, the particular parol proof especially objected to by the plaintiffs in error was not, because it consisted exclusively of statements made by agents of the plaintiffs, not only without authority, but in direct opposition to the written instructions, which constituted their special and only authority. It was not offered on behalf of a party to whom the alleged representations were made, nor to show that any such party was induced, by such representations, to enter into a contract by which he did not intend and agree, knowingly, to be bound. It was the naked offer of the unauthorized statements of agents—made while negotiating contracts, which they were authorized to and did negotiate—produced in evidence, neither to contradict nor to qualify the written stipulations agreed on, nor to avoid the instruments themselves, but merely to show the existence of fraudulent intentions, which, if they existed at all, were not otherwise carried out than by the writings, and the imputation of which is perfectly gratuitous.

This point was raised by the first exception of the plaintiffs in error, and was in conflict with the court's second instruction, also.

2 *Starkie's Evidence*, 84.

*Farlie v. Hastings*, 10 Ves. jun., 126, 127.

*Betham v. Benson*, 1 Gow., 45.

5. That the imputation of fraud, on the part of the plaintiffs in error, was not only gratuitous, but unnecessary. The utmost that could be made out of the charters with the \$5 clause, by the aid of all possible parol proof, would be, that they were contracts for the use of vessels, out to the Chincha Islands and back to the United States, at \$30 per ton of guano delivered. Let them be as fraudulent as could be desired, they could

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*Barreda et al. v. Silsbee et al.*

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amount to nothing worse than that. If that establishes an "advance" on the Shirley's freight, it is quite clear that a single charter-party, with provisions equivalent to that, must make out the case of the defendants in error as effectually as fifty. Now, all the charter-parties, with the \$5 clause, negotiated by Nesmith & Sons, are actually, in terms, to that identical effect, without the assistance of parol proof. All of the vessels so chartered were to proceed "direct" from New York or the other ports in the United States where they were. The owners elected to do so, in the very act of making the contracts, and the language of the charters was altered accordingly. The case of the defendants in error could not be bettered, therefore, by showing that the Boston charters, with the aid of parol testimony, amounted to what was patent on the New York charters, without it. Hence the parol proof in controversy was as superfluous as it was in opposition to what are believed to be the established rules of evidence.

The counsel for the defendants in error contended:

2. Parol testimony of the declarations and statements of Nesmith & Brown, the agents of F. L. Barreda & Bro., made by them in respect to the charter-parties which they were negotiating, prior to and at the time of the execution thereof, are admissible and competent evidence to explain the meaning and purpose of unusual provisions, to inform the ship-owner whether the plaintiffs in error meant to avail themselves of privileges reserved in the charters, or would waive them, as well as to show the true character of the transaction, that there was in fact a rise in freights, to the benefit of which the defendants in error were entitled, and that it was the object of the plaintiffs in error to disguise and conceal such rise by the form of the charter-parties executed by them.

*U. S. v. Gooding*, 12 Wh., 469, 470.

*American Fur Co. v. U. S.*, 2 Pet., 364.

*Stokes v. Saltonstall*, 13 Pet., 183, 186, 194.

*Wood v. U. S.*, 16 Pet., 360.

*Wescot v. Bradford*, 4 Wash. C. C. R., 500.

*Hayes v. Rutter*, 24 Pick., 245.

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*Barreda et al. v. Silsbee et al.*

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Hammett v. Emerson, 27 Maine, 332, 335.  
 Franklin Bank v. Steward, 37 ib., 524.  
 Wilson v. Hart, 7 Taun., 303.  
 Crocker v. Lewin, 3 Sumner, 1, 6, 10.  
 Jasigi v. Brown, 17 How., 183.  
 1 Greenleaf's Ev., sec. 285.  
 2 Cowen Phillips's Ev., (3d Amer. Ed.,) 354, 368, 369.  
 Note 290, p. 587.  
 2 Starkie's Ev., (7th Amer. Ed.,) 765, 766, 790, 791.  
 Gresley's Eq. Ev., 288.  
 Powell on the Law of Evidence, 144, 147.  
 96 Law Library, 100, 102.  
 Duvall v. Medtart, 4 H. and L., 15.  
 Byer v. Etnyre, 2 Gill, 160.  
 The U. S. v. The Amistad, 15 Pet., 594.

Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the United States for the district of Maryland. It is an action of *indebitatus assumpsit*, and was brought in the court below by the defendants in error, who were the original plaintiffs, to recover the freight earned by the ship Shirley on a charter of the ship made by the plaintiffs to the original defendants for the transportation of guano from the Chincha Islands to the United States. At the date of the charter-party, the defendants were the agents of the Peruvian Government, and, as such, had been for some time in the habit of chartering vessels to bring guano to the United States for sale. Its exportation from the islands is a Government monopoly, in which none except those employed by the Government are permitted to engage, and the defendants are the sole agents of that Government in the United States. They reside in Baltimore, and have agents in New York and Boston, duly authorized to negotiate for vessels, and, after the charters are signed by the owners, to transmit them to the defendants for their approval and signature. Their agents in Boston negotiated the charter of the Shirley, and, after it was executed in behalf of the owners, it was accordingly transmitted and signed

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*Barreda et al. v. Silsbee et al.*

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by the defendants. It is dated Boston, April 11, 1854, and recites, among other things, that the Shirley was then lying at New York, and that she was to proceed to Callao, from Australia, where she was then bound, and from thence with all convenient dispatch to the Chincha Islands, to take in her cargo of guano. She was to be at Callao ready to load in the course of January and February, 1855, or sooner, and ninety running days were allowed for loading. After completing her loading, she was to proceed direct to Hampton Roads, her place of destination, to receive orders from the defendants or their agents to discharge at any safe port not south of Hampton Roads or north of Cape Ann. Freight was to be paid at the rate of twenty-five dollars per ton, custom-house weight, and the ship was to have the benefit of any advance in the guano freights made by the charterers in the United States before she finished loading at the islands.

She sailed from New York the first of May, 1854, with a full cargo on owners' account, which she discharged at Australia, and sailed thence, in pursuance of her charter, to Callao and the Chincha Islands. Her cargo of guano was loaded between the first day of January and the ninth day of March, 1855, and on the following day she sailed for Callao, and thence to her place of destination for orders. On her arrival at Hampton Roads, she received orders to go to Baltimore, which she accordingly did, and was there unloaded between the first and the twenty-fifth day of July, 1855, having brought home fourteen hundred and fifty-nine tons of guano. Some correspondence, however, had taken place between the parties before the Shirley arrived. On the eighth day of June, 1855, the plaintiffs wrote to the defendants, referring to that clause in the charter providing for an advance, and suggesting that they had been induced to make the charter at the solicitation of their agents, upon the assurance that they should receive every advantage from any rise in freight, and expressing their astonishment at learning that they did not intend to pay more than at the rate of twenty-five dollars per ton, and signifying at the same time their willingness to listen to any fair proposition the defendants had to make. To that letter the defend-

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*Barreda et al. v. Silsbee et al.*

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ants replied, under date of the eleventh of June, 1855, to the effect that the guano freights had remained at the same rates since the Shirley was chartered, admitting, however, that they had since taken up certain vessels with the privilege of using them outwards, and saying that they had done so in several instances, and that in such cases they had allowed the vessels a compensation for that use, but that such additional compensation had nothing to do with the rates of guano, as would appear by referring to those charters. Other correspondence took place between the parties, or their counsel, which it is not necessary to notice at the present time. After the cargo of the Shirley was discharged, the defendants rendered an account of the voyage to the plaintiffs, showing a balance in their favor of twenty-one thousand nine hundred and forty-three dollars and eighty-nine cents, calculating the freight at twenty-five dollars per ton, without any allowance for a rise under the advance clause of the charter, which was not satisfactory to the plaintiffs. They claimed a further sum under the advance clause, equal to five dollars per ton upon the whole freight brought home. Seven other vessels were chartered by the defendants between the eleventh day of April and the twenty-seventh day of May, 1854, for the transportation of guano from the Chincha Islands to the United States. All of those charters were introduced by the plaintiffs, subject to objection, and they are substantially the same with that of the Shirley, and contain a similar clause, giving the vessels the benefit of a subsequent rise in the guano freights. On the first day of June, 1854, after these charters were executed, the defendants wrote to their agents in New York and Boston, enclosing a *pro forma* charter-party for vessels out and home, and authorized and instructed them to take up as many vessels as they could under such charters, without allowing the least deviation from its terms, and directing them in the same communications to keep former rates, without benefit of advance, for home charters. It recites that the vessel taken up shall proceed to Callao, from a port in the Indian or Pacific oceans, "where she is at present bound," and thence with all convenient dispatch to the Chincha Islands to take in her car

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*Barreda et al. v. Silsbee et al.*

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go, and that the vessel shall be ready to load in the course of January, 1855, and shall thence proceed to Hampton Roads for orders and to discharge, as is provided in the charter of the Shirley. Freight was to be paid on charters conforming to those instructions at the rate of twenty-five dollars per ton, custom-house weight, and the charters were to contain the following stipulation:

"It is further agreed, that within one week from the date hereof, the owners of the vessel may, if they see fit, elect to dispatch her direct to Callao and the Chincha Islands, to load, as hereinbefore provided; and in case the owners shall so elect, the charterers shall be entitled to all her earnings for such outward voyage, and shall further have the privilege of shipping by her such outward cargo, not exceeding two hundred tons, as they may desire, provided they shall do so within ten days after the owners shall have announced their election. The charterers, on the arrival of the vessel at the home port, to pay, in full satisfaction for such earnings and privilege, and of all outward freight, such gross sum as shall be equivalent to *five dollars* per ton on the return cargo delivered."

Twenty-five vessels were subsequently taken up under charter-parties substantially conforming to that stipulation, all bearing date prior to the thirtieth day of July following that instruction. Sixteen were negotiated by the agents of the defendants residing in New York, five by the defendants themselves, and the remaining four by their agents in Boston. In many of these charters, the clause prescribing the port from which the vessel was to proceed to Callao, as contained in the *pro forma* charter-party, was omitted, and another substituted in its place, as "from where she was bound," or "from Amsterdam, where bound," or from New York direct to Callao. These deviations, however, from the form of a charter furnished by the defendants must have been approved by them, as all the charters subsequently negotiated by their agents were duly transmitted to Baltimore, and received their signatures, before they went into operation. Some other deviations from the *pro forma* charter-party, of minor importance, were introduced into one or more of these charters, which it is not im-

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*Barreda et al. v. Silsbee et al.*

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portant to notice in this investigation, as they all contained the stipulation above mentioned, which is the principal subject of controversy in this suit. Under that stipulation, the owner might elect, within a week from the date of the charter-party, to dispatch the vessel direct to Callao and the Chincha Islands; and in that event, the charterers had the privilege to ship the outward cargo for their own benefit, not exceeding two hundred tons, provided they elected so to do within ten days after the owner announced his decision to send the vessel direct; and in case the owner so elected and sent the vessel, no matter whether the charterers freighted her out or not, the owner was entitled in all events to demand five dollars per ton on the return cargo of guano, in addition to the twenty-five dollars agreed to be paid in the general clause of the charter-party already stated.

Whether the vessel carried out much or little freight, or none at all, was entirely immaterial to the owner, so far as respected the earnings of the vessel, as the additional compensation in any event was to be estimated and ascertained, not upon the outward freight, but upon the return cargo; and it made no difference in respect to time, as the owner contracted that the vessel, whether freighted or not, should be at Callao ready to load in the course of January, under the penalty of twelve thousand dollars.

That stipulation, whatever might have been its object, resulted in no material pecuniary advantage to the defendants. They did not furnish any outward cargo, except in a single instance, and then only to a small amount, consisting of seven or eight boxes of cigars. In another instance, they offered to ship two iron boilers for Callao, but the owners refused to take them as deck load, alleging that it would be dangerous, and the dispute led to a cancellation of the contract by mutual consent. Except in those two cases, the defendants never attempted to avail themselves of the benefits secured by that provision, either by furnishing the freight directly or by advertising the vessels. Their counsel insist that the additional compensation was paid for the privilege thus secured; and that it makes no difference whether it was exercised or not, inasmuch as they had the right to avail themselves of it if they saw

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*Barreda et al. v. Silsbee et al.*

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fit, and found it to be for their advantage. All or nearly all of the vessels proceeded directly from the United States, carrying out no freight for the defendants, and on their return were paid the additional five dollars for every ton of guano brought home. How much that additional compensation amounted to does not appear, nor are there any data in the record from which it can be definitely ascertained. According to the charter of the Shirley, she was a ship of nine hundred and ten tons burden, and it appears that she brought home fourteen hundred and fifty-nine tons of guano, reckoned at custom-house weight. Eleven of the charters of the other vessels give their tonnage, showing that their measurement, on an average, is a fraction more than eight hundred tons. Assuming that the average of the eleven, whose tonnage is given, is the true average of the whole number chartered containing that provision, and that each brought home cargo in proportion to the Shirley, it would show that the amount of the additional compensation allowed to those vessels under that clause could not have been much less than one hundred and fifty thousand dollars. Whatever the sum was, whether more or less than the amount supposed, it must be assumed, on the theory of the defendants, that it was allowed and paid by the charterers, in consideration of the privilege secured to load the vessels outward for their own benefit, which privilege the case shows they never exercised to an extent to enable them to realize therefrom more than the sum of fifty dollars. It was insisted by the plaintiffs in the court below that this stipulation was inserted in those charters, as a device to avoid the effect of the advance clause in the charter of the Shirley and other vessels, which had gone out under similar charters, and that the real contract was one to give thirty dollars per ton for the transportation of the guano to the United States, and consequently showed that the charterers, within the period specified, had made an advance in the guano freights equal to the amount of such additional compensation.

They also offered parol proof in support of their view of these transactions, which was received by the court, subject to objection.



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*Barreda et al. v. Silbes et al.*

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Such brief portions only of the testimony as are necessary to a proper understanding of the legal questions to be decided will here be reproduced.

In respect to the vessels whose charters required that they should proceed from some port in the Indian or Pacific ocean, the plaintiffs proved that the vessels proceeded direct to Callao, and that the owners, at the time the charters were made, did not and had not contemplated any such indirect voyage, and elected, in the act of executing the charters, to send the vessels direct, and, in some instances, were told immediately, by the agents of the defendants, who negotiated the charters, that they might proceed at once, as there was no outward cargo for them. Those charters from which the above clause had been stricken out still contained the stipulation in question, allowing the election to the owners as to the course of the voyage; and in such cases, the vessels went out in ballast direct to Callao, and on their return from the Chincha Islands with a cargo of guano were paid the additional compensation.

Another class of testimony was to the effect that the agents of the defendants in New York and Boston offered thirty dollars per ton for the charter of the vessels to go direct, and, after the offers were accepted by the owners, that the charters were drawn up, containing this stipulation; and that the owners, when the charters were presented for execution, inquired why they were so drawn, and were told that it was because they had made charter-parties at twenty-five dollars per ton, and consequently did not wish that these charters should show more than that sum; and in one instance, the answer to the inquiry was, that they did not wish these charters to conflict with former charter-parties, which provided for a freight of twenty-five dollars per ton, with the benefit of a rise. These declarations of the agents of the defendants were proved by the owners of the vessels who made the charters. It was proved by the defendants that their agents never had any authority in respect to such charters, except what was conferred by the letters of instruction of the first of June, 1854; and those agents, upon being called as witnesses, denied that

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*Barreda et al. v. Silsbee et al.*

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they had ever made the declarations ascribed to them by the witnesses called by the plaintiffs.

Further explanatory and rebutting testimony was introduced by the defendants; but, as it does not give rise to any legal question for the consideration of the court, it is omitted.

After the testimony was concluded, the counsel of the defendants requested the court to exclude from the consideration of the jury all the declarations and statements of those agents given in evidence by the plaintiffs, respecting the terms, conditions, or purposes, of the charter-parties negotiated by them, varying from the authority and powers conferred on them by their written instructions; which the court refused to do, so far as regarded the declarations and statements made at the time the charters were executed, and ruled and determined that all such declarations and statements were admissible and competent evidence. To which refusal and ruling the defendants excepted, and their exception was allowed by the court.

Prayers for instruction were then made by both parties—first by the plaintiffs, and then by the defendants. Those presented by the defendants were made the subject of exception. They are eight in number, including the one embraced in the third bill of exceptions; but inasmuch as we have come to the conclusion that the instructions given by the court cover the whole controversy between the parties, they will not be specifically examined; and for the further reason, that their separate consideration would be tedious and unprofitable.

The instructions given by the court are to the effect that, in addition to the balance proved on the account rendered, “the plaintiffs are entitled to recover such further sum, if any, as the jury may find to have been the advance on the freights agreed to be paid by the defendants to any one for bringing guano from the Chincha Islands to the United States in charters executed here between the eleventh day of April, 1854, and the day the jury shall find the Shirley finished loading at the Chincha Islands.

2. “That in ascertaining whether any contract for advanced freight was made, the jury are not confined to the considera-

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*Barreda et al. v. Silsbee et al.*

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tion alone of the charter-parties executed after the eleventh day of April, 1854, but are to consider them in connection with all the evidence in the case; and if they find that the real contract, in some one or more of the charter-parties, was a contract to bring guano here and deliver it at thirty dollars per ton, and that the five-dollar clause was added to avoid any responsibility under the advance clause in the charter of the *Shirley*, then the five dollars advance is an advance freight, within the meaning of the first instruction."

Under these instructions, the jury returned a verdict for the plaintiffs in the sum of thirty thousand nine hundred and forty-four dollars and sixty-two cents. Whereupon, the defendants brought a writ of error to this court.

1. They now insist, among other things, to the effect that the advance clause in the charter-party of the *Shirley* must be interpreted to refer only to homeward voyages from the *Chincha Islands* to the United States.

2. That the charter-parties introduced by the plaintiffs to show an advance in the guano freights are on their face for voyages of a different character from that of the *Shirley*, and afforded no evidence to maintain the action.

3. That the parol evidence introduced by the plaintiffs was not admissible, and should have been rejected.

4. That even if the parol evidence were admissible, and it were competent to treat the charters under consideration as stipulations for a round voyage out and home, they would still furnish no evidence of an advance in the guano freights over the charter of the *Shirley*, unless it were shown that the earnings of the *Shirley* out, and the twenty-five dollars per ton home, were less than the thirty dollars per ton stipulated to be paid under that construction of these charters.

I. All of these propositions except one involve, directly or indirectly, the construction of the advance clause in the charter of the *Shirley*. Under that clause, the *Shirley* was to have the benefit of any advance in the guano freights made by the charterers in the United States, before she finished loading at the islands. She was chartered on the eleventh day of April, 1854, and finished loading on the eighth day of March, 1855;

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*Barreda et al. v. Silsbee et al.*

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and consequently her owners were entitled, by the express words of the contract, to claim the benefit of any advance in such freights made by the defendants in the United States between those dates.

Such an advance in guano freights could only be made by the defendants, as they were the only persons in the United States who were authorized by their Government to contract for its transportation. They could raise the price of transportation or reduce it, if the owners of vessels would accept their terms; and if not, they could refuse to contract; and if no contracts for an advance were made by them within the period specified in the charter of the *Shirley*, then her owners would have no claim for additional compensation. Their right to such compensation was not referred to the state of the market, but to the subsequent contracts made by the defendants for the transportation of guano from the Chincha Islands to the United States. Freights in general might rise ever so much, and it would not benefit the plaintiffs unless the defendants yielded to its influence, and made contracts to give higher rates for the transportation of guano. They might engage in any other branch of commerce, and give what rates of freight they pleased, and yet if they did not make any advance in the guano freights in the United States, it would not confer any benefit upon the plaintiffs. Any other advance in freights, however great and by whomsoever made, were not to be taken into account in determining the question whether the plaintiffs were entitled to additional compensation. In order to avail the plaintiffs in that behalf, it must be an advance made by the defendants, and one paid, or agreed to be paid, as the price for the transportation of guano to the United States; and it must appear that the contract for such payment was made within the period specified in that clause of the charter of the *Shirley*. Looking, therefore, to the plain import of the language of the parties, and applying that language to the subject-matter of the contract, as described in the contract itself, it is clear that the word "freight," as qualified by the word "guano," was used in a special sense, and refers solely to the price paid, or agreed to be paid, by the defendants, within the prescribed time for

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*Barreda et al. v. Silsbee et al.*

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the transportation of guano from the Chinch Islands to the United States. According to the terms of the contract, the parties agreed that the subsequent transactions of the defendants in the same trade should furnish and constitute the standard or criterion by which their rights and duties towards each other growing out of that clause in the charter-party should be ascertained and determined. Their agreement was to the effect that the plaintiffs contracted unconditionally to perform the service mentioned, for which they were in all events to receive the sum specified in the general clause of the charter-party; and in case the defendants paid or contracted to pay other persons a greater sum for the like service before the Shirley finished loading, then the plaintiffs were entitled to an additional compensation under this special clause, equal to the excess so paid or contracted to be paid to such other parties. They chartered their vessel early in the season, as appears from the date of the charter-party, and it may fairly be inferred from the nature of the transaction and the surrounding circumstances, independently of the correspondence, that some such stipulation was regarded as necessary to protect their interests in the contingency of a rise in freights as the season advanced. Such contingent agreements are of frequent occurrence between merchants and ship-owners, and are entitled to receive a liberal interpretation, as they are in furtherance of trade and equal justice between the parties. They are, perhaps, more frequently based upon the future state of the markets, and not, as in this case, upon the transactions of the merchant in the particular trade. Parties, however, have the right to select what criterion they please; and where their contracts are fairly made, they must receive a reasonable construction, so as to carry their intention into effect, and in general that intention must be gathered from the language employed, the surrounding circumstances, and the subject-matter. Our attention has been drawn to the case of *Gether v. Capper*, (80 Eng. C. L., 695,) as asserting a contrary doctrine. On a careful examination of the facts of that case, and the opinions of the judges, we have come to the conclusion that it is not opposed to the views here expressed. It was an action for freight

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*Barreda et al. v. Silsbee et al.*

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upon a charter-party. Under the general clause, a given rate of freight was to be paid in all events, as in this case; and it contained a special clause, which stipulated that the plaintiff "was to receive the highest freight which he could prove to have been paid for ships on the same voyage, when the vessel passed Elsinore." At the trial, the plaintiff was unable to prove that any other vessel had made the voyage referred to in the charter-party. Failing in that attempt, he then offered proof that a higher rate had been paid for vessels about that time from Lundswall, or an adjacent port, to London, which is a very different voyage. Whereupon a verdict was taken for the plaintiff, reserving leave to the defendant to move to enter a verdict in his favor, or to reduce the damages, as the court should think fit. A rule to show cause was accordingly granted, and after argument it was made absolute. Separate opinions were given on the occasion by the judges, to the effect that the owner could not entitle himself to the additional compensation by proving that other vessels had been chartered at higher rates from Lundswall to London, that being a different voyage, and not within the fair intendment of the charter-party. Every one of the judges present placed the decision expressly upon the words of the charter-party, and the failure of the plaintiff to bring his case within their intendment. His right to additional compensation was made to depend, by the express words of the contract, upon his being able to prove that other vessels at the time specified received or were to receive higher rates of freight for the same voyage. He failed to exhibit the proof, and, of course, was not entitled to recover. His contract prescribed the criterion by which his claim to additional compensation was to be ascertained and determined, and he had no right to go out of the contract and select a new standard, to which the other contracting party had not consented. It is far otherwise with the plaintiffs in the case under consideration. Their case rests upon somewhat different grounds. They have proved the state of facts on which their right to recover depends. According to the verdict of the jury, and the instructions of the court, their case is brought within the legal intendment of the contract, leaving nothing for the considera-

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*Barreda et al. v. Silsbee et al*

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tion of this court, except the legal questions presented in the bills of exception. Their ship was to have the benefit of any advance in the guano freight made by the charterers in the United States before she finished loading. They contracted to bring guano from the Chincha Islands to the United States for a given rate per ton, and the defendants stipulated to pay that rate, and if they paid or contracted to pay other vessels a higher rate before the Shirley finished loading, then they agreed to give the plaintiffs an additional compensation equal to that excess; and for that excess of rate per ton the plaintiffs were entitled to recover, together with the balance of the account rendered, which was admitted to be correct by the defendants. These suggestions lead necessarily to the conclusion that there is no error in the charge of the Circuit Court, so far as respects the construction of the contract, as the instruction in that particular was in strict conformity to the views here expressed. It was to the effect that if the jury found that the defendants had agreed to pay others more than twenty-five dollars per ton for bringing guano from the Chincha Islands to the United States under charter-parties executed here between the dates before mentioned, then they were authorized to find a verdict in favor of the plaintiffs for that excess. All of the charters relied on by the plaintiffs as tending to show that such was the fact, were substantially of the same character, so that if one had that tendency, then all had, and that was conceded in the argument, and must have been so understood by the jury.

II. In the next place, it is insisted that the declarations and statements of the agents of the defendants, made at the time those charters were executed, were improperly admitted as evidence, and two grounds are assumed in support of the proposition. First, that they were made without authority, and therefore were not admissible to affect the interests of the defendants; and, secondly, that they were admitted in violation of the well-known rule that parol evidence is not admissible to explain, vary, or contradict, a written instrument. All such declarations and statements made subsequently to the execution of the charters were properly ruled out and excluded from the consideration of the jury.

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*Barreda et al. v. Silsbee et al.*

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1. Some brief reference to the facts of the case becomes necessary, in order to test the correctness of the first ground assumed under this last proposition. Full authority had been conferred upon those agents to negotiate for the vessels whose charters were introduced by the plaintiffs. Those declarations and statements were made by their agents in respect to the subject-matter of the negotiation, and at the time the charters were presented to the owners of the vessels for execution. After they were executed by the owners, they were forwarded to the defendants and received their signatures, and every assurance given by the agents to the owners of the vessels was subsequently made good by the defendants. They were told there was no outward cargo for them, and that they might proceed immediately; and they were allowed to do so, without objection or remonstrance. The vessels carried out no freight, and, on their return, the owners were paid thirty dollars per ton on the return cargo, without hesitation or complaint. Accompanying those explanations were others to the effect that the stipulation in question had been inserted in the charters, so that they might not conflict with those previously made providing for a rise in freight; and the circumstances fail to disclose any other substantial purpose for which it was done.

Parties do not usually contract heavy pecuniary obligations without some object in view; and as no substantial one is disclosed, except the one assigned by the plaintiffs, it is impossible to say, as matter of law, that the charters in question and the surrounding circumstances had no tendency to maintain the issue for the plaintiffs. Where the fact of agency has been proved, says Mr. Starkie, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal, whose mere instrument he is, and then, whatever the agent says, within the scope of his authority, the principal says; and evidence may be given of such acts and declarations, as if they had been actually done and made by the principal himself. That principle was directly sanctioned by this court in *United States v. Gooding*, 12 Wheat., 470, where the views of the author, as above quoted, were cited and approved (2 Star. Ev., 45.) Whatever the agent



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*Barreda et al. v. Silsbee et al.*

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does in the lawful prosecution of the business intrusted to him by the principal, is the act of the principal; and there, says Mr. Greenleaf, his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting a part of the *res gestae*, and they are of the nature of original evidence, and not hearsay; and Judge Story, in his valuable Treatise on the Law of Agency, maintains the same doctrine. (1 Greenl. Ev., 35; 118 Story on Ag., sec. 184.) Acts and declarations of an agent are admissible under such circumstances, upon the ground that, whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal, and consequently may be proved in like manner as if the evidence applied personally to the principal. (*American Fur Co. v. The United States*, 2 Pet., 364.) On the whole case, we are of the opinion that the evidence of original authority in the agents was sufficient to warrant the court in submitting their declarations and statements to the jury.

In the same connection, it was also denied at the argument that there is any sufficient evidence in the case to show that the agents of the defendants had any authority to make deviations from the *pro forma* charter-party furnished to them on the first day of June, 1854. A recurrence to the evidence, however, will show that the suggestions are not well founded. They commenced negotiating for vessels under those instructions shortly after they were received, and continued the business till nearly the close of July. All the charters, after they were executed by the owners, were forwarded to the defendants, and received their signatures. One bears date as early as the fifth day of June, and others as late as the twenty-ninth day of July, showing that they were approved as they were forwarded, and at different times. These facts present strong presumptive evidence of authority, fully warranting the court in submitting the question to the jury.

2. The second ground assumed by the defendants, under this proposition, is, that the declarations and statements of their agents ought to have been excluded, for the reason that

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*Barreda et al. v. Silsbee et al.*

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parol evidence is not admissible to explain, vary, or contradict, a written contract. That principle, as a general rule applicable to parties and privies, and their representatives, and those claiming under them, is undeniable, and is not disputed by the counsel of the plaintiffs. They contended, however, in the court below, and still insist, that the right of the plaintiffs to demand additional compensation in this case was made to depend, by the express words of the contract, upon the subsequent transactions of the defendants in the same trade, and that the stipulation in the subsequent charters is so framed that it covers up and conceals the real nature of the contracts between the parties. They went farther in the court below, and still insist that the real contract was one to pay thirty dollars per ton to bring guano from the Chincha Islands to the United States, and that the stipulation was framed in the form in which it appears, graduating five dollars on the outward and twenty-five dollars on the home voyage, for the express purpose of relieving the defendants from the responsibility which they had incurred to the plaintiffs, under the charter of the Shirley, and the jury have found all these alleged facts in favor of the plaintiffs. Whether the jury were warranted in so finding or not, is not a question for an appellate tribunal. That question cannot be re-examined by this court. For the purposes of any examination of the case which it is competent for this court to make under the Constitution of the United States and the laws of Congress, it must be assumed that the facts of the case have been correctly found by the jury. Repeated decisions of this court have affirmed the doctrine, which is but a repetition of the constitutional provision upon the subject, that no fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law; and it is well known that the only modes known to the common law of re-examining the facts of a case, after they have been found by a jury, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or by the award of a *venue facias de novo* by an appellate court, for some error of law which intervened in the proceedings

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*Barreda et al. v. Silsbee et al.*

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Parsons v. Bedford et al., 8 Pet., 447.

United States v. King et al., 7 How., 845.

Richardson v. Doane, 8 Dall., 102.

United States v. Eliason, 16 Pet., 801.

Phillips v. Preston, 5 How., 289.

Whether the evidence, when offered, is admissible, is a question for the court; but when admitted, the question whether it is sufficient or not is for the jury, and it is their province to draw from it all such inferences and conclusions as it conduces to prove, and which, in their judgment, it does prove; and their finding is conclusive, unless a new trial is awarded by the court in which the case is tried, or in the appellate tribunal, for some error of law. Guided by these principles, it must be assumed, in the further examination of this question, that the facts are as they have been found to be by the jury. It then appears that the real contract in these charters was one to pay thirty dollars per ton for bringing guano from the Chincha Islands to the United States, and that the stipulation in question was inserted in the charters to cover up and conceal the real nature of the contract, in order to enable the defendants to relieve themselves from the responsibility which they had incurred in their previous contract with the plaintiffs; and the question is, whether the parol evidence was properly admitted to prove those facts. When the plaintiffs offered to prove those facts in the court below, the question was then presented to the Circuit Court precisely as it is here stated. Evidence, when offered at the trial, must be assumed to exist, and to be true, for the purpose of determining the question of its admissibility. Proof, such as was offered and received in this case, could only be rejected upon one of two grounds—first, that the evidence of the facts was not admissible; and, secondly, that if the facts were proved, they would have no tendency to maintain the action. That they would maintain the action if proved, no one can doubt; so that the only question is, whether they were admissible.

One further explanation is necessary, in order to present the question in its true light. It is not pretended that the parol evidence conflicts in any manner with the written contract on

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*Barreda et al. v. Silsbee et al.*

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which the suit was brought. On the contrary, the objection is directed solely to its effect upon the charter-parties subsequently executed by the defendants with the owners of the other vessels. Those charters were introduced by the plaintiffs as evidence in the cause, to show their right to recover. They also relied on the circumstances attending the transactions, and the declarations and statements of the agents who negotiated them, and the subsequent conduct of the defendants in respect to the same subject-matter. At the trial, the charters were submitted to the jury as evidence, and the jury were told, in effect, that they were not confined to the charters alone, but were at liberty to consider them in connection with all the other evidence in the case, in order to ascertain what the real contracts were between those parties.

Where the effect of a written agreement collaterally introduced as evidence, as in this case, depends, not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. It was so held by this court in *Etting v. The Bank of the United States*, 11 Wheat., 75, and we think the principle is correct. In that case, the testimony consisted of various communications and reports made to the bank, of their own transactions, and of the admissions of the parties or their agents, and it was insisted, on the part of the bank, that the jury were not at liberty to draw inferences of fact from the written evidence; to which objection, Marshall, Ch. Jus., replied, that "were the fact as alleged, and were it true that all the testimony is in writing, the consequence drawn from it cannot be admitted." Other cases have been decided by this court, applying the same doctrine as in *Iasigi v. Brown*, 17 How., 182. That was an action brought to recover damages against the defendant for a false representation respecting the pecuniary standing of a third party, whereby the plaintiff had been induced to sell goods, and had incurred loss. Letters were introduced, and facts and circumstances connected with them proved; and this court held that it was for the jury to say, after examining the letters in connection with the facts and circumstances, whether they

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*Barreda et al. v. Silsbee et al.*

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were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the party, to which the defendant knew he was not entitled.

Another view of the question is also very properly invoked by the plaintiffs. Their claim to additional compensation, by the express words of the contract, was made to depend upon their being able to exhibit proof that the defendants had paid other parties a higher rate than twenty-five dollars per ton for the same service. Oral proof to that effect, if credible, was as good as written. They were at liberty to rely upon the one or the other, or upon both combined, as circumstances might indicate it to be for their interest or convenience. Beyond question they might introduce those charters for that purpose, if they saw fit; or, if they had the means, and preferred to do so, they might prove their case by other evidence; and it cannot be maintained that their right to do so was in any manner impaired after those charters were introduced. They were not parties to those contracts, nor did they in any legal sense claim under them. Their rights being made to depend upon the subsequent transactions of the defendants with third parties, it was clearly proper to admit proof to show what those transactions were.

Several courts and text writers have stated the principle much broader than it is here laid down. The rule excluding parol proof in such cases, says Mr. Greenleaf, cannot affect third persons; who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness, or fraud, of the parties, and who therefore ought not to be precluded from proving the truth, however contradictory to the written instruments of others. In *Krider v. Lafferty*, (1 Whar., 814,) it is held, that the rule is applicable only in suits between parties to the agreement, and their representatives and those claiming under them, and not to strangers. It is also held in England, in several cases, that the rule is not applicable to strangers. (*King v. Inhabitants of Cheadle*, 8 Barn. and Ad., 833; 2 Taylor's Ev., sec. 827, and cases cited; *Wilson v. Hart*, 7 Taun., 294; *Overseers of Berlin v. Norwich*, 10 John., 229; *Poth on Obl.* by Evans, n. 766; 2

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*United States v. Sutter.*

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Cow. and H., notes, 354, 368; Reynolds v. Magness, 2 Ired., 26; 1 Greenl. Ev., sec. 279.)

Parol testimony is always admissible in matters of contract, to show fraud, notwithstanding its effect may be to contradict what is in writing. That principle is too well established and too generally acknowledged to require any confirmation. Parties have the right to make their own contracts; and, in general, when they are satisfied, that is sufficient, and others have no right to complain. Cases, however, occasionally arise, where a contract, though *bona fide* between those who made it, may operate as a fraud upon third parties; and in this case, assuming the facts to be as they have been found by the jury, and as the evidence tends to prove, that the stipulation in question was inserted in those charters for the purpose of enabling the defendants, by that device, to avoid their responsibility to the plaintiffs, whether the owners of the vessels knew the purpose or not, the act so far partakes of the nature of a fraud between the parties to this suit as to authorize the introduction of parol evidence, to show what the truth was in regard to those transactions.

For these reasons, we are of the opinion that the instructions given by the Circuit Court were correct, and that there is no error in the record.

The decree of the Circuit Court therefore is affirmed, with costs.

Mr. Justice WAYNE, Mr. Justice CATRON, and Mr. Justice GRIER, dissented.

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THE UNITED STATES, APPELLANTS, v. JOHN A. SUTTER.

The evidence is satisfactory to this court, that Alvarado, the Governor of California, granted a tract of land, to the extent of eleven leagues, to John A. Sutter, in 1841.

Although the original grant has not been produced, yet there is sufficient proof that it once existed, and was destroyed by fire. A draught of the grant, prepared by the Governor, is found in the archives, and the grant was recorded in the county registry of deeds; and this, together with the other evidence in

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*United States v. Sutter.*

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the case, shows that it was genuine, and also the map which accompanied it. Although the map was incorrect in its lines of latitude, yet it can be located by its reference to natural objects.

This grant was authorized by the colonization laws of 1824 and 1828.

But another grant, purporting to be issued by Micheltorena in 1845, for the surplus of the former grant, being an additional quantity of twenty-two leagues, does not stand in the same position.

Supposing it to be genuine, yet the situation in which Micheltorena was placed at its date was such as to impair its validity. He had been driven from his capital, was not in the peaceful exercise of his official authority, and was shortly after compelled to abdicate. The grant was not recognised by the persons who succeeded him, nor was it produced by the claimant to be placed in the archives. It was not a valid claim at the date of the treaty of Guadalupe Hidalgo.

Grantees under the claim may prosecute it for confirmation in the name of the original claimant.

THIS was an appeal from the District Court of the United States for the northern district of California.

It was a claim made by Sutter for land in California, under two different grants.

1. A claim for eleven leagues of land, alleged to be granted to him by Alvarado, on the 18th of June, 1841.

2. A claim for an additional quantity of twenty-two leagues, alleged to be granted to him and his son, John A. Sutter, by Micheltorena, on the 5th of February, 1845.

The board of commissioners confirmed both claims, and this decree was affirmed by the District Court. The circumstances of the case are so fully related in the opinion of this court, that it is unnecessary to repeat them.

It was argued by *Mr. Black* (Attorney General) and *Mr. Hull* for the United States, and by *Mr. Orittenden*, *Mr. Butts* and *Mr. Walker*, for the defendant in error. The points made in the argument are mentioned in the opinion of the court, together with remarks upon them, which render it unnecessary to state the points more particularly.

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes to this court by appeal from a decree of the District Court of the United States for the northern district of

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*United States v. Sutter.*

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California, which affirms a sentence of the board of commissioners to settle private land claims in that State, in favor of the appellee, upon a claim to thirty-three square leagues of land in the valley of the Sacramento river. The record shows that the claimant, a native of Switzerland, immigrated to the Department of California about the year 1839, was naturalized as a citizen of Mexico, and with the leave of the Government formed a settlement near the junction of the Sacramento and American rivers, which he designated New Helvetia. The country at the time was uninhabited, except by bands of warlike Indians, who made frequent depredatory incursions upon the undefended settlements to the south and east of this place. In two or three years after his arrival, the claimant was commissioned by the Governor of California to guard the northern frontier and to represent the Government in affording security and protection to its inhabitants against the invasion of the Indians and marauding bands of hunters and trappers, who occasionally visited the valley for plunder. In the year 1841 he commenced the erection of a fort at New Helvetia, at his own expense. It was surrounded by a high wall, and was defended by cannon. Within this fort there were dwelling-houses for his servants and workmen, and workshops for the manufacture of various articles of necessity. There was a grist-mill, tannery, and distillery, attached to the establishment. A number of Indians were domesticated by him, and contributed to cultivate his fields of grain, and to defend the settlement from more savage tribes. He was possessed of several thousands of horses and neat cattle, which were under the care of his servants. There were collected at different times from twenty to fifty families, and there were in the course of years some hundreds of persons connected with this settlement. He is described as having been hospitable and generous to strangers, and the Governors of California bear testimony to the vigor with which he performed the duties of his civil and military commission.

In March, 1852, he placed before the board of commissioners a claim for eleven leagues of land, to include his place at New Helvetia, and extending thence north, which were granted



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*United States v. Sutter.*

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to him by Juan B. Alvarado, Governor of California, 18th of June, 1841.

In March, 1858, he amended his petition and claimed an additional quantity of twenty-two leagues, which were granted to him and his son, John A. Sutter, the 5th of February, 1845, by Micheltorena, the Governor of California; this being the surplus (*sobranie*) contained within the limits from which his first grant was to be fulfilled. The *espediente* submitted to the board, with the grant of Alvarado, and as a part of it, represents that he is in possession of New Helvetia, and that his enterprise there had the sanction of the Government, and had been prosperous; that he had associated with him industrious families; and that, besides the advantage to himself, he had awakened industry in others, and had also, by the strength of his company, formed a strong barrier against the savage Indians. He asks to enlarge his establishment, by introducing twelve families, and for this purpose solicits a grant of eleven leagues at his establishment of New Helvetia, from the Governor, together with his powerful influence before the supreme Government of the nation, that its approbation might be given. The Governor recognises the truth of the statements in the *espediente*, and declares that he has been sufficiently informed that the land is vacant and suitable for the purpose of the grantee. He grants to the applicant, "for him and his settlers, the said land, called New Helvetia, subject to the approbation of the supreme Government and of the Departmental Assembly," and subject to four conditions. The third and fourth relate to the boundaries of the land and the consummation of the title, and are as follows: "3d. The land of which donation is made to him is of the extent of eleven *sitios de ganado mayor*, as exhibited in the sketch annexed to the proceedings, without including the lands overflown by the swelling and current of the rivers. It is bounded on the north by los Tres Picas (three summits) and the 39° 41' 45" north latitude; on the east by the borders of the Rio de las Plumas; on the south by the parallel 38° 49' 32" of north latitude; and on the west by the river Sacramento. 4th. When this property shall be confirmed unto him, he shall petition the proper judge to give him pos

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*United States v. Sutter.*

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session of the land, in order that it may be measured, agreeably to ordinance, the surplus thereof remaining for the benefit of the nation, for convenient purposes. Therefore, I order that this title being held as firm and valid, that the same be entered in the proper book, and that these proceedings be transmitted to the excellent Departmental Assembly."

The first inquiry in cases like this is, has the authenticity of the grant been established? This was not questioned in the District Court, but in this court the appellants have denounced, with much force, the evidence as insufficient to support it. The original issued to the donee was not produced either to the board of commissioners or the District Court. To account for its non-production, two witnesses were examined, who say that a paper, purporting to be an original, and which had the appearance of authenticity, was in the possession of one of them, as the agent and attorney in fact of the claimant; that this paper was destroyed by fire with the office in which both lived in the fall of 1851. An affidavit of the claimant in another case is in the record, in which he says that the original is lost. Some months before this fire, this paper was recorded in the county registry of deeds, and the recording clerk affords some evidence to the genuineness of the paper. It is shown that it had been exhibited in controversies before courts of justice, and had been examined by adverse claimants and their counsel, and at other times by interested and inquiring parties.

A grant of the same date, for the same quantity of land, in the same locality, and issued by the same officer, was reported to the United States by William Carey Jones, Esq., their agent, as existing in the archives of California in 1850. In his intercourse with the officers of the California Government, the claimant asserted his title to New Helvetia, and his assertion was admitted; and accurate accounts of his location and settlement, and the terms on which they were made, are to be found in historical and descriptive works published under the authority of foreign States, upon the testimony of their agents, who visited California prior to 1845. (*Fremont's Rep.*, 246; 1 *Duflot de Mofras Explor. de l'Oregon and des Cal'as*, 457.) Be-

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*United States v. Sutter.*

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sides this consistent testimony, there is produced from the archives a draught of a grant corresponding to that produced from the county records, except in respect to the signatures.

The Governor, Alvarado, testifies that this draught was prepared by him, and from it the original that issued to Sutter was prepared by the secretary, and that the draught was deposited by his directions, and is now there. The fact that his name is not attached to this draught does not impair its authority under the circumstances of this case. (*Spencer v. Lapsley*, 20 How., 264.)

We agree that the rule of law which requires the best evidence within the power or control of the party to be produced should not be relaxed, and that the court should be satisfied that the better evidence has not been wilfully destroyed nor voluntarily withheld. But the rule on the subject does not exact that the loss or destruction of the document of evidence should be proved beyond all possibility of a mistake. It only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant. In every well-regulated Government, the deeds of its officers, conveying parts of the public domain, are registered or enrolled, to furnish permanent evidence to its grantees of the origin of their title. An exemplification of such a record is admissible, as evidence of the same dignity as of the grant itself. (*Patterson v. Wynn*, 5 Pet., 233; *U. S. v. Davenport*, 15 How., 1.) This rule exists in States which have adopted the civil law. In those States, the deed is preserved in the archives, and copies are given as authentic acts—that is, acts which have a certain and accredited author, and merit confidence. The acts thus preserved are public instruments, and all doubts that arise upon the copies that may be delivered are resolved by a reference to the protocol from which the copies are taken, and without which they have no authority. (1 *White Recop.*, 297; *OWINGS v. HULL*, 9 Pet., 607.)

When, therefore, a protocol is found in the archives, the non-production of the original given to the party cannot furnish much cause for suspicion or alarm. The map to which

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*United States v. Sutter.*

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the grant refers, and which properly forms a part of it, is not produced from the archives. The testimony of the witnesses is, that there was a map accompanying the original, and was burned with it. An engineer or surveyor, (Vioget,) who prepared maps for the claimant, testifies that, in January, 1841, he made duplicate maps for the claimant of the establishment at New Helvetia, and surveyed eleven leagues at that place; and that, in 1843, he traced a copy from one of these, and that copy is produced and filed with the petition. It is a fair conclusion, from all the evidence, that these maps of Vioget were presented to the Governor, and form the basis of the grant, and make a part of it.

The secretary, Jimeno, who was examined in reference to an application of the appellee for an enlargement of his establishment, by the donation of the *sobranie*, says that a map accompanied the petition, and exhibited the land desired; that he made a favorable report upon the petition. The petition for the surplus, or *sobranie*, implies there was an existing and operative grant, which the authorities recognised and respected. With this map, we have no difficulty in locating the grant so as to include New Helvetia. Without it, the question would be, whether the general description of New Helvetia should overrule the particular description by metes and bounds, contained in the third condition; for it is ascertained that the exact position of the line of latitude which determines the southern boundary lies twenty miles north of the principal establishment. But the map shows that the line of the southern boundary is south of New Helvetia, and is so related to natural objects represented on it as to be easily determined. Vioget accounts for the error in the designation of the line by the imperfection of the instruments, and proves that a starting corner was fixed, and the line traced on the ground. This is better evidence of the true location of the southern line, and conforms to the probabilities of the case. Upon the whole evidence, we find that the grant and map filed with the petition in 1852, before the board of commissioners, have been proved. The authenticity of the grant being ascertained, the question of its validity, as a colonization grant, under the

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*United States v. Sutter.*

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laws of 1824 and of 1828, remains to be considered. To these laws, the authorities of California habitually refer as the source of their authority.

The law of 1828 authorizes the political chief to grant lands to an *empresario* who may wish to colonize; but that the grant shall not be definitely valid without the previous approbation of the supreme Government, to which the *espediente*, with such report as the Departmental Assembly may think fit to make, shall be communicated. Before conceding lands, the chief was directed to make inquiries that the candidate was embraced by the laws, and that the land was suitable for colonization, and was not subject to any existing right.

The grant to the claimant recites that the Governor had obtained the information necessary, and that the requirements of the law had been fulfilled.

No condition was imposed upon the claimant in respect to the distribution of the lands among the families to be introduced. The object of the grant, on the part of the authorities, seems to have been to secure the services of an efficient and competent officer, in a distant and exposed portion of the province, who would undertake to give repose and security to the settlements in that region; and this distribution of lands was confided to him as a trust, and a compensation for the performance of that duty.

The quantity of land was not greater than the colonization laws authorized an individual to hold, and the only care of the authorities was, that the consideration of the grant should be secured from the donee. The evidence is satisfactory that the expectations of the donors were entirely fulfilled. During the early administration of Alvarado and Micheltorena, the grantee seems to have had the favor of the political authorities, and in 1844 there was no objection opposed by them to the enlargement of his enterprise. He was referred to for information in business of the department, and, in the civil commotions that preceded the overturn of the power of Micheltorena, he was the principal stay of his administration; and when called in question, subsequently, by the enemies of his chief, he said: "My establishment is situated between the San Joaquin and

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*United States v. Sutter.*

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Sacramento rivers. It is the point which forms the frontier of the Mosebulos Indians, who are those who attack the ranchos and seize the horses. It is the road of transit from the interior. These reasons, not less than the great distance from my place to the other settlements, suggested to me the propriety of building my fort; and in order to do so, I obtained a license from the Government of the country."

Subsequently to February, 1845, he seems not to have been molested by the Government of Mexico, but remained the only representative of its power and authority in the valley of the Sacramento. There was no inconvenience felt by the failure to complete the grant, and there was no denunciation, by any one, of the land, for a breach of any condition. When the treaty of Guadalupe Hidalgo was ratified, he was a citizen of Mexico, in possession of the property comprehended in the grant, and is entitled to all the guarantees provided by that treaty for the Mexican population of California. He has submitted his claims to the tribunals appointed by the United States within the term prescribed, and is ready to abide their action in reference to them. We know of no law of the United States which authorizes us to pronounce a sentence of forfeiture for any act or omission since the date of the treaty. Our opinion is, that this grant is a valid claim under that treaty.

The grant purporting to be issued by Micheltorena at Santa Barbara, the 5th February, 1845, and submitted to the board of commissioners in March, 1853, remains to be considered.

The original of this grant was not produced. It is not in the list of grants reported to the Government by Mr. Jones, nor is it found in the archives of California. It has not been placed upon the county records of Sacramento county, nor is there any evidence that it was ever produced in any of the controversies for the land included in it. There is no petition, or reference to the secretary, or compliance with any other formality prescribed by the law of 1828, preliminary to the issue of grants for lands. The record shows, that in 1843, or 1844, the claimant applied for the *sobrante* or surplus, and that his petition was referred to the secretary for further in-

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*United States v. Sutter.*

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formation, and that he reported there was no objection ; that the Governor reserved the subject for consideration until he could visit the Sacramento valley, and that the papers were returned to the claimant.

In February, 1845, there existed a revolt against the Government of Micheltorena, in which the principal inhabitants of California participated. Micheltorena abandoned his capital, and, on his way to Los Angeles, reached Santa Barbara, where the claimant joined him with a body of " foreign volunteers." The deposition of Castanada, the aid-de-camp of Micheltorena, has been taken. He says that the claimant presented a petition for a grant to himself and his son ; that he (Castanada) drew the deed, and that it was executed by the Governor, in his presence, at Santa Barbara ; and that he believes that the paper presented is a true copy. One of the volunteers testifies that the Governor made a speech to the volunteers, in which he said he had granted to Sutter all the lands he had claimed, (or asked for,) and that he had issued grants to all the applicants for lands who had been licensed to settle in the valley of the Sacramento. He says, about two months after he saw a grant in the hands of Sutter, which Sutter informed him had been delivered at that time, and that he thinks the present copy corresponds with the one he then saw.

The two witnesses who proved the loss of the other grant testify that the original of this was destroyed at the same time with the other, and that the paper produced is a copy of the one destroyed.

This evidence is not entirely satisfactory to establish the execution of the grant. The two witnesses first named speak of a paper they had not seen since 1845, and one of them was not familiar with the language in which it is written. One of the other witnesses is largely interested as a grantee of the claimant in the issue of this suit, and the fourth immigrated to California after the treaty, was not conversant with the Spanish language, and derived much of his impressions from the parties who claimed title under Sutter, and of whom he was the attorney.

But we are not disposed to place the decision of the cause

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*United States v. Sutter.*

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upon the deficiency of the evidence of the execution of the paper, and therefore do not pronounce absolutely upon it.

The decisions of the court show that they have been disposed to interpret liberally the measures of the Mexican authorities in California, and to view with indulgence the acts and modes of dealing of the inhabitants, having reference to the laws of distribution and settlement of the public domain. The circumstances in which the Governor was placed required that his power and discretion should not be circumscribed by narrow limits. In a remote province of the Mexican Republic, he was almost the only representative of the general and common will of the nation, and he was habitually in collision, sometimes in violent collision, with provincial feelings, sentiments, and interests. At the time this grant purports to have been made, he was engaged in a civil war, which, after having been smothered for a time, had burst forth with increased violence. Within two or three weeks from the date of the grant, the war was terminated by the agreement of Micheltorena to abandon the country. He never returned to the capital, except to prepare for his departure. The laws of Mexico for the colonization and settlement of the public domain embody a comprehensive and liberal policy, and the arrangements for their execution denote care and circumspection on the part of their authors in securing their faithful administration. They authorize the Governor (*politicos gefes*) to grant lands to those who may ask for them, for the purpose of cultivating and inhabiting them. They require that every person soliciting for lands shall address the Governor a petition, expressing his name, country, and profession, the number, description, religion, and other circumstances of his condition, and describing as distinctly as possible, by means of a map, the land asked for; that the Governor shall obtain the necessary information whether the petition embraces the requisite conditions required by the law as to the person and land, and, if necessary, that the municipal authorities might be consulted whether there be an objection to making the grant or not; that the grants made to private families or persons shall not be held to be definitely valid without the previous consent of the Departmental Assem-



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*United States v. Sutter.*

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bly, and, in case of their dissent, that it should be referred to the supreme Government. The definitive grant being made, a document signed by the Governor shall be given, wherein it must be stated that said grant is made in conformity with the provisions of the laws in virtue whereof possession shall be given, and that the necessary record shall be kept, in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded quarterly to the supreme Government.

The office of political chief of a State or Province has long existed in Spain, (whence it was derived by Mexico,) and his duties are defined with precision in the works on the administrative law of that monarchy. The authoritative acts of this officer assume the form of ordinances and regulations, or of decrees and judgments. The former relate to the concerns of the Department, and may issue spontaneously, while the latter always proceed upon a petition. There are scarcely any formulas prescribed for these acts. But there exist certain rules, consecrated by usage, sanctioned by reason, and required by justice, some of which have received the assent of the legislator, and others are official regulations.

The administration has need of information, and hence the political chief may consult with subordinate authorities and corporations in all business in which exact information is required of local facts and circumstances, and he is bound to hear the suggestions of the deputations and provincial assemblies when the law requires it—a rigorous condition, a compliance with which should appear in the recitals of the disposing part, and the inserting of the customary formulas, that the act may not be contested for excess of power. Finally, all the acts of the political chief shall be authenticated by his signature, and it concerns the good order of the administration that they should be inserted in a special record. (Colmeiro derecho Admin., secs. 285, 286.)

Assuming the statements of the witnesses, Castanada and Ford, to be accurate, it can hardly be contended that the issue of this grant was an act of civil administration, or had

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*United States v. Sutter.*

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any reference to the law of colonization and settlement. At a distance from the capital, in the prosecution of an intestine war against a band of insurgents, surrounded by a body of foreign volunteers, in whose fidelity his safety depends, the Governor promises to dispose of the public domain as a compensation for service, or as an inducement to loyalty. In a few days this Governor is defeated, vacates his post, and his troops are disbanded.

The hostile Government that succeeded to that of Micheltorena have not recognised the legality of the deeds of the deposed chief, nor did the claimant (so far as we are informed) attempt to obtain any sanction to his claim, or to introduce the evidence in his possession among the archives of the Department, without which a perfect title could never have been obtained. On the contrary, the record shows that he was a captive in the hands of the enemies of Micheltorena, and was released, after humble apologies, for his adherence to the unfortunate chief, and protestations that in future he would be loyal to the existing authorities. He kept his grant concealed apparently as a dangerous secret, until an entire change in the political constitution of the country took place. In our opinion, this was not a valid claim at the date of the treaty of Guadalupe Hidalgo, and is not entitled to recognition from the United States.

It appears from the deeds in the record that the claimant has conveyed nearly all of his estate in the land included in the two grants, and objection is taken to the form of the suit. It is contended that the claim should have been preferred by the grantees of the claimant. We admit the force of the argument in favor of the objection, and that the dormant interests of persons not parties on the record may frequently disturb the course of justice.

But the contrary practice was sanctioned in *Percheman's* case, (7 Pet.,) and has been followed since. It is competent to persons interested in the claim to employ the name of the original claimant. (*United States v. Percheman*, 7 Peters, 51; *United States v. Patterson*, 15 How., 10.)

The decree of the District Court is affirmed, in so far as it

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*United States v. Sutter.*

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relates to the grant bearing date the 18th of June, 1841, and executed by Juan B. Alvarado; and is reversed in so far as it relates to the grant purporting to have been executed by Micheltorena, at Santa Barbara, the 5th of February, 1845; and the cause is remitted to the District Court for further proceedings in respect to the location of the grant of Alvarado, within the limits set forth in the grant and the accompanying map on file in the case.

Mr. Justice DANIEL and Mr. Justice CLIFFORD dissented.

Mr. Justice CLIFFORD:

I respectfully dissent from so much of the opinion of the court as affirms that a proper legal foundation was laid at the trial for the introduction of *parol* evidence to establish the existence and authenticity of the Alvarado grant. When a concession of land is made by the Government to an individual under Mexican laws, as in this case, a duplicate copy of the title-paper is required in all cases to be filed in the proper tribunal for registry; and unless that is done, it is difficult to see how a legal registry can be made. That duplicate copy is in the nature of an original paper, and, after registry, becomes the foundation of all the subsequent proceedings of the Government to perfect the grant in the donee. It was the duty of the purchaser in this case, in the absence of any original grant, to produce that duplicate copy, if in existence; and if not, then to account for its loss. According to the draught presented as a copy, proved by *parol* evidence, the grant was made subject to the approval of the supreme Government and of the Departmental Assembly. It has never been decided that a grant issued by a subordinate officer, subject to the approval of the supreme Government, was valid without such approval; and, in my judgment, the doctrine cannot be maintained without subverting the essential principles on which every well-regulated Government rests. That grant was never approved, either by the supreme Government or the Departmental Assembly. Under the circumstances disclosed in the record, I

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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cannot concur that it is the duty of the United States, under the treaty, to disturb the possession of the settlers, while it appears that there is better evidence to establish the right of the donee, if any he had, to the land described in his concession. On the proofs exhibited, I am of the opinion that the decree of the District Court should be wholly reversed.

Mr. Justice DANIEL:

I fully concur in the above opinion.

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WILLIAM CUSHING, JOHN N. CUSHING, AND CALEB CUSHING,  
OF NEWBURYPORT, MASSACHUSETTS, OWNERS OF THE BRIG  
JAMES GRAY, LIBELLANTS AND APPELLANTS, v. THE OWNERS  
OF THE SHIP JOHN FRASER AND THE STEAMER GENERAL  
CLINCH.

An ordinance of the city authorities of Charleston, prescribing where a vessel may lie in the harbor, how long she may remain there, what light she must show at night, and making other similar regulations, is not in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States. It is therefore valid.

A vessel at anchor is bound to show such a light as is required by the local regulations.

Where a vessel, being towed into port by a steam-tug, came into collision with a vessel at anchor, and the steam-tug and vessel at anchor were both in fault, the loss must be equally divided between them, provided the ship in tow was thrown against the vessel at anchor without any fault or negligence on the part of the vessel in tow.

THIS was an appeal from the Circuit Court of the United States for the district of South Carolina, sitting in admiralty.

It was a case of collision, in the port of Charleston, under the circumstances particularly set forth in the opinion of the court.

The James Gray was at anchor, and the John Fraser was being towed into the harbor by the steamer General Clinch, when a collision ensued between the John Fraser and the James Gray. The owners of the latter libelled both the two

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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other vessels. The District Court dismissed the libel against the steamer, but decreed for the libellants against the John Fraser, \$3,902.67, being the amount paid for repairs to the James Gray, and also a sum for demurrage.

The case was carried up to the Circuit Court, where additional evidence was taken, and the judge reversed so much of the decree of the District Court as condemned the ship John Fraser in damages, and affirmed the judgment in favor of the steamer. The libel was therefore dismissed, with costs. An appeal brought the case up to this court.

It was argued on behalf of the appellants by *Mr. Oushing* and *Mr. Gillet*, on behalf of the owners of the John Fraser by *Mr. Brown*, and on behalf of the steamer General Clinch by *Mr. Mitchell*.

The counsel for the libellants contended that the James Gray was not in fault, and of course had a right to recover damages from somebody; that the steamer and the Fraser were both to blame, for many reasons; and that if the court should think that the James Gray committed any fault, then the other two vessels should be responsible for half of the damage.

The counsel for the steamer contended that the James Gray was to blame; but if some one had to pay the damages, it should be the John Fraser.

The counsel for the latter vessel contended also that the James Gray was in fault; but if any one had to pay the damages, it should be the steamer.

To follow the arguments through all these various ramifications, would require more space than can be allotted to the case.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a case of collision in the port of Charleston, in South Carolina.

The brig James Gray took on board a valuable cargo at Charleston, destined for Antwerp, and in the prosecution of her voyage hauled off from the wharf into the stream and an-

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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chored, on the 1st of February, 1856. The place where she anchored was in the harbor, and was the place where vessels bound out usually anchored for a short period, to make their final preparations for sailing on their voyage. It was, however, a thoroughfare for vessels bound in, and through which they were almost continually passing. She remained there until the collision took place, which happened on the night of the 5th of the month above mentioned, about seven o'clock, shortly after daylight had disappeared. On that evening the John Fraser came in from sea, in tow of the General Clinch. The latter was a steamboat, occasionally employed in towing vessels in and out of the harbor, and was properly fitted and manned for that purpose. There was ample room on both sides of the James Gray for the tug and the tow to have passed with safety, if the James Gray had been seen in time. But she was not seen, either from the General Clinch or the John Fraser, until the steamboat was abreast of her, and at the distance of not more than forty or fifty fathoms. She was then for the first time seen by those on board the General Clinch, which had just before, and almost at the same moment, cast off the hawser by which she was towing the John Fraser. The towing line was about fifty fathoms in length, according to the testimony of the pilot of the General Clinch, and was attached to the larboard bow of the tow, and it was cast off by the General Clinch without any previous notice of the intention to do so at that particular moment; and it appears to have been altogether unexpected on board the John Fraser. And as soon as she was cast off, and not before, those on board of the John Fraser, for the first time, discovered the James Gray directly ahead, and upon which she was running. She endeavored to avoid her by putting her helm hard to starboard, in order to pass on the same side and in the wake of the tug; her speed, however, from the tide and the impulse she had received from the steamboat, was then about six knots an hour; and she reached the brig before her course could be sufficiently changed to avoid a collision. The rigging of the John Fraser became entangled in the bowsprit of the brig which it carried away, and caused other damage to the vessel to a serious amount.

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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So far the facts are undisputed; we come now to the points in controversy.

The libel is filed *in rem* by the owners of the James Gray against the ships above mentioned, alleging that she was free from fault, and that the damage was occasioned altogether by their negligence and mismanagement, and claiming the right to charge them with the whole amount of the loss sustained.

The owners of the John Fraser and the owners of the General Clinch answer separately, each of them charging the misconduct of the James Gray as the cause of the disaster, but each of them also imputing some degree of blame to each other.

They charge against the James Gray that she was lying in a thoroughfare in the harbor, in violation of the local port regulations, and without the light that these regulations required. And they produce two ordinances of the corporate authorities of the city of Charleston, one of which provides that no vessel shall lie in this thoroughfare for more than twenty-four hours, and inflicts certain penalties for every disobedience of this ordinance; and the other requires all vessels anchored in the harbor to keep a light burning on board from dark until daylight, suspended conspicuously midships, twenty feet high from the deck.

The power of the city authorities to pass and enforce these two ordinances is disputed by the libellants. But regulations of this kind are necessary and indispensable in every commercial port, for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of Con-

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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gress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States.

Yet, upon the evidence before the court, we do not think the *James Gray* ought to be regarded as in fault, by remaining at anchor in the harbor beyond the time limited in the city ordinance. She was seen there by the harbor-master day after day, without being ordered to depart; nor did he seek to inflict the penalty. The object of this regulation was obviously to prevent this thoroughfare from being crowded by vessels at anchor, which would make it inconvenient or hazardous to vessels coming into the port. And from the conduct and testimony of the harbor-master, it may be fairly inferred that this regulation was not strictly enforced when the thoroughfare was not over-crowded, and that single vessels were sometimes permitted to remain beyond the time fixed by the ordinance, without molestation from the city authorities. And this lax execution of the regulation would soon become a usage in the port, and will account for the indifference with which the harbor-master saw her lying there three days beyond the limited time, without even remonstrance or complaint. He appears to have acquiesced. And if this was the interpretation of the ordinance by the local authorities, it ought not to be more rigidly interpreted and enforced by this court.

But the omission of the light prescribed by the regulation stands on different grounds. There was certainly no acquiescence of the local authorities in that respect; and, upon the testimony, it is a matter of dispute whether she had any light or not. That question will be considered hereafter. But it is admitted on all hands that she had not a light suspended conspicuously midships, twenty feet above the deck, as the regulation requires; and the light which she alleges she used was not the ordinary globe lamp used by vessels at anchor, but a lantern of triangular form, with one side dark, and the light shining only through the other two, and which, consequently, could not be seen by those who approached on the dark side. The ordinance obviously contemplated the usual signal light of a vessel at anchor, which is bright on every side, and can be seen by those who are approaching from any direc-



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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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tion. And as the regulations of the port required a light of this kind, suspended in the manner hereinbefore mentioned, the James Gray could not be justified in disregarding this regulation, and substituting a light of a different description, and placed in a different part of the vessel. Those who were coming into port had a right to presume that a vessel anchored in this thoroughfare would have the light prescribed by the port regulations. They would look for no other, nor expect to find a vessel in their way without one, and might be misled as to the exact position of the vessel, if a light of a different character was shown or hung up in a different place. And as the light of the brig (if she had one) differed in character and place from the one which the regulations and usages of the port required, and which incoming vessels would look for, she committed a fault which justly subjects her to damages for the collision. She had not taken those means to avoid it which the regulations of the port in which she was lying required and prescribed.

But, apart from the regulations of the local authorities, we think the James Gray was in fault upon the established principles of maritime law. She was at anchor at a place where vessels were continually passing. It was her duty, therefore, to show at night the usual signal light of a vessel at anchor—that is, a globe lamp, or one without any dark side to it, which could be seen from any direction, and hung high enough in the rigging to be seen at a distance.

The witnesses who were on board of the General Clinch and the John Fraser say she had no light of any kind immediately before and at the time of the collision; and in this they are supported by the testimony of other witnesses who were observing her about the same time. But those who were on board of the James Gray testify to the contrary, and their testimony is confirmed by others; and we think that, upon the whole evidence, the just conclusion is that she had a light, in a lantern of triangular form, with one dark side, hanging on the fore swiftsure, twenty feet and some inches above the deck. The fore swiftsure is, we understand, the foremost rope of the foremast shrouds.

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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Now, a light of this description is not ordinarily used as a signal light for a vessel at anchor ; but is used at sea, fastened at the bowsprit, with the opaque side to the ship, so as to throw a strong light ahead. And it is obvious that such a lantern, fastened to a single rope at the top only, and more than twenty feet from the deck, would be liable to waver, from the motion of the vessel as she was riding at anchor, and to turn its dark side sometimes in one direction and sometimes in another ; and if such a light was used as a signal light, it was more especially the duty of those in charge of the brig to see that the lamp was securely fastened, so as to present its bright sides in the direction in which vessels were likely to approach.

But this is not proved to have been done. It is true that one of the witnesses for the libellants (Wycoffe) says it was securely fastened at the top and the bottom, with the dark side to the stern. This may have been the way in which it was usually fastened, but none of the witnesses examined by the libellants know how it was fastened that night. Wycoffe does not appear to have even been on deck when it was put up. It was put up by a boy ; and when the light appeared dim after the collision, Wycoffe says he started to take it down ; but the boy was too quick for him, and took it down and trimmed it.

The second mate, who gave the order to the boy to put it up, went below to his tea immediately afterwards, without waiting to see that his order was properly executed ; and the first mate went down with him ; and no one but this boy appears to have known how it was fastened to the rope that night. He was not examined as a witness, nor is his name mentioned. They speak of him as "the boy," and we think it was great want of care on the part of the officer in charge of the deck to confide this important duty to the heedlessness of a boy. His age is not stated, nor his previous pursuits, nor how long he had been on board, nor his knowledge or fitness for the duty intrusted to him. The place where the brig was anchored, and the character of the light they were about to display, made it the more imperatively the duty of the officers to see that it was securely and properly fastened, so as to present the bright sides to the incoming vessels, as she was in most danger of being

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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run into by them. But without the testimony of the boy who put it up and took it down, or any proof of his age and character, from which it might be inferred that the duty was well and faithfully performed, the court cannot say that a sufficient light was displayed to warn vessels coming into the harbor that she was at anchor in this thoroughfare.

Indeed, the just inference from the testimony would be otherwise; for if the lantern was carelessly hung, and liable to move to some extent from one to the other, so as at one moment to present its bright side, and a moment after its dark side in the same direction, it would account for the difference in the testimony of different witnesses, who looked at her from the same point of view, some testifying that she had no light, and others that she had a very bright one.

Independently, therefore, of the local regulations, the James Gray, upon the general principles of maritime law and usages, cannot be acquitted of negligence, and must share in the loss.

But the conduct of those on board of the General Clinch was equally culpable. For if, as they contend, the brig showed no light, or if the dark side of the lantern was turned towards her when she was approaching, yet it is satisfactorily proved that the night was light enough to have enabled her to see the brig at a distance abundantly sufficient to pass with her tow without danger to either, and that she must or would have been seen with a proper look-out.

The General Clinch was not under the control of the captain of the John Fraser, but under the command and direction of her own pilot, who was substituted for her regular captain, who was not on board. She could select her own course and her own rate of speed, and was bound to keep a vigilant and competent look-out in the thoroughfare in which vessels so frequently anchored. But there is no proof to show that this was done. The three hands who were at the stern of the steamboat, awaiting the order to cast off the hawser, were certainly not look-outs. The pilot who was in command had his attention drawn to other matters, and was preparing to give the order to cast loose the hawser, and in communicating with the ship he had in tow. It is said, indeed, that there were two

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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of the crew in the forward part of the vessel, whose duty it was to keep a look-out; but, being colored persons, they could not, by the laws of South Carolina, be examined as witnesses. But the law requires of a colliding vessel, that she shall prove not only that she had a competent look-out stationed at the proper place, but also that the look-out was vigilantly performing his duty. And if he placed there persons who cannot be witnesses, it is his own fault; it was his own voluntary act, and can therefore be no sufficient reason for the absence of that proof which the law requires him to produce.

It was especially the duty of the officer in command of the steamboat, in a crowded harbor like that, when his tow was following him at the rate of six or seven miles an hour, and her course necessarily directed by the steam-tug, to have scanned carefully the surrounding objects before he cast loose the tow line, and to see that there was nothing in the way of the tow which she could not avoid by means of her own rudder, without the aid of the steamboat, and also to have given reasonable notice of his intention, in order that she might prepare to take care of herself. But this was not done. He suddenly let go the towing line, without notice or warning to the John Fraser. And the moment after he had done so, and not before, he finds his own vessel almost aboard of a vessel at anchor, and the head of the John Fraser, under the direction and impulse his ship had given her, directed upon the anchored vessel, and too near to avoid a collision when she had lost the aid of the General Clinch.

This state of things could not have happened without great want of care on the part of the steam-tug. Indeed, this negligence is apparent from the testimony of the pilot himself, who was acting as captain. He says his station was on the wheel-house; and that after he let go the John Fraser, he had just time to walk from the bow to the aft part of the steamer, when he saw the Gray. She was not, therefore, first seen from the wheel-house or the bow, but from the stern of his vessel, when he was nearer to her than he was to the ship he was towing. The stern of the vessel is not the first place from which the James Gray would have been seen, if the wheel-house was a

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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proper place, and he had performed there the duty of a look-out. And as regards the two hands which he states were forward as look-outs, they appear never to have seen the brig until after she was discovered by the pilot from the stern, when in the act of passing her bow, for they gave no notice of a vessel ahead, and do not appear to have seen her before her proximity was announced by the pilot. If stationed forward as look-outs, it is very clear that they were not performing that duty, and the collision was the natural consequence of their negligence; for the James Gray was plainly seen from the John Fraser the instant the steam-tug dropped the tow line and turned out of her way; and as the tow line was fifty fathoms long, the steamboat could unquestionably also have seen her as she approached her, at least at that distance ahead, as well as from the stern; and if she had been seen even at that distance, and the General Clinch had held on to the hawser, she could have carried the John Fraser safely past, and without danger.

And upon such proofs of negligence and of want of proper caution, the court is of opinion that the General Clinch is justly answerable, as well as the James Gray, for the consequences of this disaster.

So far as the ship John Fraser is concerned, we see nothing in the evidence from which any fault or mismanagement can justly be imputed to her. According to the usage of trade at that port, she engaged a steamboat, well acquainted with the harbor and its usages, to bring her in. When fastened to the hawser, and in tow, she was controlled entirely by the steam-tug, both as to her course and speed. The steamboat was not subject to the orders of the commander of the John Fraser, but was altogether under the control and direction of her own commander for the time. A look-out on board of the John Fraser would be of little or no value, for the view ahead was obstructed by the steam-tug, and she could do nothing more than watch the motions of the steamboat, and use her own rudder, so as to keep her as nearly as might be in the wake of the tug to which she was attached. She had a right to suppose that a proper look-out would be kept by the

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*Owners of Brig James Gray v. Owners of Ship John Fraser et al.*

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steamboat, and that she would not be led into dangers from which no effort on her part would enable her to escape. And she was brought into this dangerous proximity to the James Gray, and then cast loose, under circumstances which rendered a collision inevitable; and she was driven against the vessel at anchor altogether by the direction and impulse which she received from the controlling power of the steamboat, and not by any act of negligence or mismanagement on her part.

It is indeed said by some of the witnesses, that if she had put her helm to the larboard, instead of the starboard, as soon as she was cast off, she might have passed in safety on the other side of the James Gray. But the weight of the proof is clearly to the contrary; and we are convinced that she adopted the only chance for safety, by putting her helm to starboard, and endeavoring to pass on the same side that the steam-tug had passed.

It is true, that the John Fraser was the *res* or thing which struck the James Gray, and did the damage. But the mere fact that one vessel strikes and damages another, does not of itself make her liable for the injury; the collision must in some degree be occasioned by her fault. A ship properly secured may, by the violence of a storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it. Yet she certainly would not be liable for damages which it was not in her power to prevent. So also ships at sea, from storm or darkness of the weather, may come in collision with one another, without fault on either side; and in that case, each must bear its own loss, although one is much more injured than the other. This was decided by this court in the case of *Stainback et al. v. Rae et al.*, (14 How., 582;) and the decision placed upon the ground that neither of them had committed a fault, and could not therefore justly be charged with any portion of the injury which the other had sustained. And as this collision was forced upon the John Fraser by the controlling power and mismanagement of the steam-tug, and not by any fault or negligence on her part, she ought not to be answerable for the consequences.

The result of this opinion is, that the loss must be equally

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*Insurance Co. of the Valley of Virginia v. Mordecai.*

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divided between the James Gray and the General Clinch, according to the rule laid down by this court in the case of the Schooner Catharine et al. v. Dickinson et al., (17 How., 170.)

The decree of the Circuit Court is therefore reversed; and the case remanded, with directions to adjust the loss upon the principles stated in this opinion.

We do not assent to so much of this opinion as makes the "James Gray" liable for negligence, merely for want of exact conformity to port regulations.

S. NELSON.

R. C. GRIER.

NATHAN CLIFFORD.

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**THE INSURANCE COMPANY OF THE VALLEY OF VIRGINIA, PLAINTIFFS IN ERROR, v. MOSES C. MORDECAI.**

A writ of error must be made returnable to the first day of the term, which is now the first Monday in December. If made returnable to any subsequent day, it is erroneous, and will be dismissed on motion. It cannot be amended.

THIS case was brought up by writ of error from the Circuit Court of the United States for the western district of Virginia.

It was an action of debt, brought by Mordecai, (a citizen of South Carolina,) upon a judgment which he had obtained against the insurance company, in the Circuit Court of the United States for the district of South Carolina. A judgment was given also for Mordecai in the Circuit Court of Virginia, from which the insurance company sued out a writ of error in October, 1858, which was made returnable to this court on the "second Monday in January next," (being the second Monday in January, 1859.)

*Mr. Phillips* moved to dismiss the writ of error, on the ground that the writ was not made returnable according to law, and in support of the motion gave the following reasons:

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*Insurance Co. of the Valley of Virginia v. Mordecai.*

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The English rules with regard to the return day of a writ of error are—

In the King's Bench it is returnable *ubicumque*, &c., on the first or last *general* return of the term.

In the Exchequer Chamber it is returnable before the justices of the Common Bench, &c., on a *particular* return day.

In the House of Lords, when the Parliament is sitting, the writ is made returnable before the King in his present Parliament, *immediate*. After a prorogation, the writ is returnable at the next session; or after a dissolution, at the next *Parliament*, specifying the day when it is to be holden.

By the act of 24th September, 1789, the court was directed to hold two sessions, the one commencing the first Monday in February, and the other, first Monday in August. The sessions of the court were subsequently changed by statute to be the second Monday in January, and then to the second Monday in December.

While the statute gives the commencement of a term, it does not regulate its duration. The court may sit several months or one month. If, therefore, a writ of error is not made returnable to the first day of the session, it may so happen that the record would be sent up on a day when the court is not in session.

It is true that the acts of Congress do not determine the day of return; this was left to be determined by the court, under the power given to regulate its process.

Under the act of the 3d May, 1792, it was made the duty of the clerk of this court, with the approval of two of the judges, to prepare the form of a writ of error. This was done, and the writ then made out undoubtedly made it returnable to the first Monday of the court. The clerk informs me that at each succeeding change of the terms, new blanks have been prepared, in which the return day was stated to be the first of the term. Not only is the act silent as to the day of the return, but it is equally so as to the term. Yet this court has in two cases dismissed a writ of error when a term had intervened. (*Hamilton v. Moore*, 8 Dal., 371; *Blair v. Miller*, 4 Dal., 21.)

While no rule of the court specifically declares that the writ



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*Insurance Co. of the Valley of Virginia v. Mordecai.*

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shall be made returnable to the first day of the term, the 43d rule, adopted in 1835, declares that, when the judgment or decree is rendered thirty days before the term, the cause shall be docketed and the record filed within the first six days of the term. This is wholly inconsistent with the idea that a writ of error on such a judgment could be made returnable at a subsequent period.

**AMENDMENT.**—At common law, writs of error were not amendable. (1 Arch. Drac., 214.) This was afterwards regulated by stat. of 1 Geo. I.

The 32d section of the judiciary act, though writs of error are not named, may be understood to confer a similar authority.

It may be, therefore, that leave to amend will be granted when there is anything to amend by. This was the case in 4 Dal., 12.

In this case there is nothing to amend by.

The motion was opposed by *Mr. Robinson*, upon the following grounds :

1. Under section 22 of the act of Congress establishing the judicial courts of the United States, a writ of error issued by the clerk of the Supreme Court is to be returnable at a certain day and place therein mentioned, but that day need not be the first day of the next term.

The form of a writ of error is given in Curtis's Digest, p. 599. It is made returnable to "the ——— Monday of ——— next." It may be that, in most cases, it is now made returnable to the first Monday in December, and that formerly, when the term commenced the second Monday in January, it was in most cases made returnable to that day. This, however, is not because of any necessity to make it returnable to the first day of the term, but because that, in most cases, is a convenient day

It would be of no avail to make it so returnable when there is not, between the day on which the writ of error issues and the first day of the next term, time to give the adverse party the twenty or thirty days notice required by the act of Congress.

Nor will it do to say that, during the twenty or thirty days

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*Insurance Co. of the Valley of Virginia v. Mordecai.*

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next preceding the commencement of a term, no writ of error is to issue ; for that would make it impossible ever to obtain under section 23 a *supersedeas* to a judgment rendered within those twenty or thirty days.

Judge Curtis observes that the citation "may be made returnable in term, and on *such a day of the term* as will enable the plaintiff in error to have it served on the adverse party thirty days before its return day." This is entirely correct. And there is but a slight inaccuracy in the language which follows, to wit: that "if this can be done thirty days before the first day of the next term, it *should* be made returnable on that day." No doubt that, in such case, it *may* be made so returnable. But, in the nature of things, it is, at the time of issuing the writ, impossible to know whether the writ can be served thirty days before the first day of the next term. It is therefore proper that there should be room for some exercise of discretion on the subject, and that the writ should be made returnable to some day of the next term sufficiently distant to make it probable that there can, before that day, be the twenty or thirty days notice.

In this very case it was, at the time the writ of error issued, exceedingly doubtful whether, in the very short time that remained, it would be practicable to serve the writ of error under section 23, by lodging a copy thereof in the clerk's office, where the record remains, within ten days, Sundays exclusive, after rendering the judgment. And if the twenty days notice could not be given in this way, it was, at the time the writ issued, far from being certain that there would, before the first day of the next term, be sufficient time to give that notice in any other way. It was therefore proper to make the writ returnable to some convenient day beyond the first day of the next term ; and the second Monday in January was such convenient day.

2. Under the act of Congress of May 8, 1792, sec. 9, it was the duty of the clerk of the Supreme Court to transmit to the clerks of the inferior courts the form of a writ of error approved by two of the judges of the Supreme Court, and it was lawful for the clerks of the inferior courts to issue writs of

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*Insurance Co. of the Valley of Virginia v. Mordecai.*

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error agreeably to such forms as nearly as the case may admit. (Brightly Dig., p. 187, sec. 4; p. 260, sec. 6; p. 896, secs. 5, 11.)

It may reasonably be presumed that, in discharge of the duty prescribed by this act, the form of a writ of error was approved by two of the judges of the Supreme Court, and transmitted to the clerks of the inferior courts, and that the writ of error in this case was issued agreeably to such form. If so, the writ of error must be lawful unless there be something in the act which in terms requires the writ to be returnable to the *first day* of the term. But this is carefully avoided by the act, which directs merely that the writ of error shall be "returnable to the Supreme Court."

3. If there be any irregularity in the writ, it is merely clerical, like the irregularity in *Course, &c., v. Stead and wife*, 4 Dall., 22, and *Blackwell v. Patten, &c.*, 7 Cranch, 277. As the irregularity of the teste was insufficient to quash or dismiss the writ in those cases, so the irregularity in the return day is equally insufficient to quash or dismiss the writ here. As in *Course, &c., v. Stead and wife*, the writ was amendable in respect to the teste, so here it is amendable in respect to the return day.

In *Mossman v. Higginson*, 4 Dall., 12, where the return day of the writ of error was left blank, it was deemed a merely clerical error, and, as such, amended. The writ is regularly tested here as it was there, and, it appears, *when* the writ was filed below and here.

*Wood v. Lide*, 4 Cranch, 180, modifies or explains *Hamilton v. Moore*, 3 Dall., 871, and *Blair v. Miller*, 4 id., 21. In those cases, the objection was, not that the writ was defective in form, but that, after the return day, a whole term passed before the record and writ of error were filed in the Supreme Court.

Mr. Chief Justice TANEY delivered the opinion of the court. The defendant in error, on the 8th of October, 1858, obtained a judgment against the plaintiffs in error in the District Court of the United States for the western district of Virginia

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*Insurance Co. of the Valley of Virginia v. Mordecai.*

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On the 18th of the same month, this writ of error was sued out, and made returnable on the second Monday in January then next ensuing—in other words, it was made returnable on the second Monday in January, in the present term of this court; and the defendant in error was cited to appear here on that day.

A motion has been made to dismiss the case, upon the ground that, in order to bring the judgment of the District Court before this court, the writ of error must be returnable on the first day of the term, and that a writ of error with a different return day is not authorized by law, nor by the rules and practice of this court.

By the act of Congress of May 8, 1792, (1 Stat., 278,) it was made the duty of the clerk of this court to transmit to the clerks of the several Circuit Courts of the United States the form of a writ of error, to be approved by two of the judges of this court; and the clerks of the Circuit Courts were by that act authorized to issue writs of error agreeably to such form, as nearly as the case would admit. And it is by virtue of this act alone that the clerk of a Circuit Court, or of a District Court exercising the jurisdiction of a Circuit Court, is authorized to issue a writ of error to remove a case to this court.

Immediately after its passage, the form of a writ of error was adopted and transmitted to the clerks of the Circuit Courts, pursuant to its provisions; and that form made it returnable on the first day of the term of this court next ensuing the issuing of the writ—that is, on the day appointed by law for the meeting of the court. The form then adopted has never been changed, nor are we aware of any case in which a writ of error with a different return day has been sanctioned by this court.

It is unnecessary, therefore, to inquire what may be the rules of practice in this particular in other courts. The legal return day was fixed under the authority of the act of 1792; and a writ of error issued by the clerk of a Circuit Court, or of a District Court exercising the powers of a Circuit Court, with a different return day, or differing in any other material respect from the form transmitted, is without authority of law, and will not bring up the case to this court.

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*Insurance Co. of the Valley of Virginia v. Mordecai.*

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The rules of the court have been framed in conformity with this return day of the writ; and the rule which permits a defendant in error to docket and dismiss a case if the transcript is not filed by the plaintiff within the time therein limited, necessarily presupposes that the writ is returnable on the first day, and that the plaintiff might then file the transcript.

He may, it is true, return the writ with the transcript at any time during the term, unless the case has been docketed and dismissed, when it cannot afterwards be filed without the special order of the court. But this permission to return the writ, and file the transcript at a subsequent day, is upon the principle that, for certain purposes of convenience or justice, the term is considered as but one period of time—as one day, and that day the first of the term. The writ before us was obviously issued by some oversight of the clerk, who followed the form used when this court met on the second Monday in January, without, it would seem, adverting to the circumstance that the day of meeting had been changed by law, and that the first Monday in December, and not the second Monday in January, was the first day of the term.

Neither can the writ of error be amended. The defendant in error was cited and admonished to appear on the second Monday in January; and if the writ were amended, it could not be maintained with this citation, for the defendant must be cited to appear on the same day that the writ is returnable. The citation is the regular and familiar process from a court of justice, notifying and requiring the defendant to appear and make his defence, if he has any, on the return day of the writ. And the common-law process of a writ of error made returnable on one day, and a summons to the defendant to appear at another, would be without precedent, and would be as objectionable as the entire absence of a citation. And the want of proof that the defendant was cited has always been held to be a fatal defect in the process prescribed and required by the act of 1789, whereby a party is authorized to bring the judgment of an inferior court before this court for revision—a defect which can be cured only by the voluntary appearance of the party entered on the record.

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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Nor can this mistake be corrected by a citation from this court. The act of Congress requires it to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court.

The case must therefore be dismissed for want of jurisdiction in this court.

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**THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD  
COMPANY, PLAINTIFFS IN ERROR, v. PHILIP QUIGLEY.**

A railroad company is responsible in its corporate capacity for acts done by its agents, either *ex contractu* or *in delicto*, in the course of its business and of their employment.

It is responsible, therefore, in an action for the publication of a libel.

It is within the course of its business and the employment of the president and directors, for them to investigate the conduct of their officers and agents, and report the result to the stockholders.

But a publication of this report must be made under the conditions and responsibilities that attach to individuals under such circumstances.

In the absence of any malice or bad faith, a report to the stockholders is a privileged communication. But this privilege does not extend to the preservation of the report and evidence in a book for distribution amongst the persons belonging to the corporation, or the members of the community.

So far, therefore, as the corporation authorized the publication in the form employed, they are responsible in damages.

But the instruction of the Circuit Court was erroneous, holding the corporation responsible for a publication which took place after the commencement of the suit. Also an instruction allowing the jury to give exemplary damages, because there was no evidence that the injury was inflicted maliciously or wantonly.

Under the general-issue plea, no question could be raised as to the capacity of the parties to sue in the Circuit Court.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

It was an action on the case for libel brought by Quigley against the railroad company, under the circumstances which are fully set forth in the opinion of the court, which also contains the instructions of the Circuit Court to the jury.

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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The case was argued by *Mr. Schley* and *Mr. Donaldson* for the plaintiffs in error, and *Mr. Johnson* and *Mr. Davis* for the defendant.

The counsel for the plaintiffs in error made the following points:

1. An action of libel cannot be sustained against the plaintiff in error. The laws, under which it exists as a corporate body, are a part of the record. It is a railroad company, with defined and limited faculties and powers; and it can exercise no *incidental* powers, except such as are necessary to the full exercise of the faculties and powers expressly given by its charter. Being a mere legal entity, it is incapable of *malice*; and in the very definition of libel, *malice* is an essential element. The action should have been instituted against the natural persons, who published the alleged libel.

*Rex v. The Great North of England Railway Co.*, 9 Q. B., 815.

*Stevens v. Midland Counties Railway Co.*, 10 Exchequer, 852.

*Commonwealth v. The Proprietors of New Bedford Bridge*, 2 Gray, 345.

*State v. Great Works Mill and Man. Co.*, 20 Maine, 41.

*McClelland v. Bank of Cumberland*, 24 Maine, 566.

*Childs v. Bank of Missouri*, 17 Missouri, 213.

And, for illustration, the cases of *Colman v. The Eastern Counties Railway Co.*, 4 Railway C., 518, and *Salomons v. Lainy*, 6 Railway C., 301, are referred to, showing that the corporation is not bound by acts of directors, when such acts are *ultra vires*.

2. Even if the action of libel could be maintained against the plaintiff in error, in a case of *unlawful* publication, yet, upon the proof in this case, there was no such publication.

The communication, by the president and directors to the stockholders, of the results of the investigation into the conduct of the company's officers, was a privileged communication; and even if it amounted to a publication, no action will lie, unless upon proof of express malice and the want of proba-

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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bie cause; and the burden of proving malice and want of probable cause was on the plaintiff below.

Van Dyck *v.* Guthrie, 4 Duer, 268.

Vanderzee *v.* McGregor, 12 Wend., 545.

Davison *v.* Duncan, 40 Law and E. Rep., 219.

Shipley *v.* Todhunter, 7 Carr and Payne, 680; 32 Eng. C. L. Rep., 685.

Somerville *v.* Hawkins, 10 C. B., 583; 70 Eng. C. L. Rep., 583.

Taylor *v.* Hawkins, 16 Q. B., 308; 71 Eng. C. L. Rep., 307.

Harris *v.* Thompson, 13 C. B., 333; 76 Eng. C. L. Rep., 333.

Cockayne *v.* Hodgkinson, 5 Carr and Payne, 543; 24 Eng. C. L. Rep., 448.

Toogood *v.* Spyryng, 1 Cr. Mees. and Ros., 181.

Padmore *v.* Lawrence, 11 Ad. and El., 380, 89 Eng. C. L. Rep., 115.

Howard *v.* Thompson, 21 Wend., 320.

Bradley *v.* Heath, 12 Pick., 163.

Hopwood *v.* Thorn, 8 Mann., Grang., and Scott, 315; 65 Eng. C. L. Rep., 291.

White *v.* Nicholls, 3 How., 266.

Cooke *v.* Wilde, 30 Law and E. Rep.

3. But there was no evidence of *publication*, by the defendant, of the matter complained of as libellous. The report of the president and directors to the stockholders of the company, communicating the results of the investigation, was no such *publication*; and the adoption of their report, and the consequent printing of the testimony, and its authorized distribution amongst the *stockholders*, was no such publication.

Rex *v.* Baillie, 2 Esp. N. P., 10, and cited in Howard *v.* Thompson, 21 Wend.

4. There was no evidence of express malice on the part of the corporation, or on the part of the board of directors, or on the part of the stockholders. It is not a case in which vindictive damages could properly be given.

2 Greenl. Ev., secs. 253, 420.

Day *v.* Woodworth, 13 How., 371



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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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5. The first instruction of the court below was erroneous in several particulars. It directed the jury that they might *infer* malice, from the mere falsehood of *any* statement in the letter of Mahoney, respecting the plaintiff in his trade and occupation; and that the distribution of the printed book, among *any* of the stockholders, rendered the defendant liable in the action. The defendant, under this instruction, was not at liberty to claim a verdict, except upon *proof of the truth of every statement* in said letter; for the distribution of the book, to some extent, amongst the stockholders, was not denied.

6. But the second instruction was even more exceptionable. It was calculated to mislead the jury; and, although, undoubtedly, not so designed, seemingly suggests to them the propriety of giving *exemplary* damages. The *quantum* of damages, under this instruction, was to be composed of two items: firstly, such amount as would render *reparation to the plaintiff*; AND, secondly, such amount as would act as an adequate *punishment to the defendant*; and in making up this blended amount, the jury were told to give such damages as, in their opinion, were *called for* and *justified* in view of all the circumstances of the case. The instruction left the jury at large, irrespective of the special character in which the plaintiff complained. In his declaration, the plaintiff sued, in his character *as a mechanic*, for an alleged libel upon him, *as a mechanic*; and he complains of injury to his reputation, not as a *man*, but *as a mechanic*; and he claims *special*, and not *general*, damages. Now, there was certainly evidence, and strong evidence, to show that the plaintiff had not sustained any *actual* damage in his reputation, or in his business, *as a mechanic*; and, if so, the case was one, not for *vindictive*, but *nominal* damages. The standard of making *reparation to the plaintiff*, and of punishing the *defendant*, is not warranted by the declaration, and not justified by the cause of action.

7. The Circuit Court, *upon the proof adduced*, had not jurisdiction in this case. The plaintiff and defendant were not citizens of different States.

[The plaintiff sued as a citizen of *Delaware*. The defendant was described as "a body corporate in the State of Maryland

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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incorporated by a law of the General Assembly of Maryland.' But the proof showed that the defendant was also a body corporate in *Delaware*, incorporated by an act of the Legislature of Delaware. If the defendant was a citizen of *Maryland*, (as regards the question of jurisdiction,) because incorporated under the laws of Maryland, then, by parity of reason, the defendant was also a citizen of Delaware, because incorporated under the laws of Delaware. The proof also showed that four of the directors and some of the stockholders were citizens and residents of Delaware; and the articles of union, under which the defendant exists as a corporate body, contain an express provision, that the stated meetings of the board of directors shall be held, alternately, in Wilmington and in Philadelphia; and that an office shall be kept open in Wilmington, for the transfer of the stock of the company. And by the provisions of an act of the State of Delaware, forming a part of the charter of this company, an annual tax is imposed on so much of its capital stock as formed, before the union, the capital stock of the Wilmington and Susquehanna Railroad Company.]

The plaintiff and defendant below were therefore citizens of the *same* State.

In the case of this company against Howard, (13 How., 307,) this point did not arise, as the plaintiff in that case was a citizen of *Illinois*.

In the case of *Marshall v. The Baltimore and Ohio Railroad Company*, (16 How., 314,) no question was made below in relation to jurisdiction, and the proof did not present the precise question which arises in this case.

In *Rundle v. The Delaware and Raritan Canal Company*, (14 How., 80, 95,) the facts were essentially different.

Nor was it necessary that this objection should have been made by *plea in abatement*. The cases of *Sheppard v. Graves*, (14 How., 510,) and of *Jones v. League*, (18 How., 76,) it is supposed, do not apply to a case like this. The objection does not present any question of disability of the plaintiff, or of privilege of the defendant. Pleading to the action admits, indeed, the averments of the declaration as to the citizenship of the

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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parties, but nothing more. And if the defendant *be* a citizen *also*, of Delaware, as well as of Maryland, there is no repugnancy between the fact admitted in the pleading, and the fact established by the proof. The court, *sua sponte*, would decline jurisdiction in such case, even if waived by the parties.

The counsel for the defendant in error made the following points:

1. That a corporation may be liable for a libel.

P. and D. St. Co. v. Hungerford, 6 G. and J., 291; 7 G. and J., 44.

East Counties Railway v. Brookes, 2 Eng. L. and Eq., 406.  
16 East, 8; Angel & Ames, ch. 10, sec. 9; 14 Eng. C. L. R., 159.

Merls v. Tariff. Manuf. Co., 10 Conn., 384.

Williams v. Beaumont, 10 Bingham, 260, 270.

Goodspeed v. E. Haddam Bk., 22 Conn., 580, 588.

Trenton M. L. I. Co. v. Perine, 3 Zebraskie, 402.

2. That there is sufficient proof of the publication and printing by the corporation.

Clark v. Corp. Washington, 12 Wheat., 40.

Bank U. S. v. Dandridge, 12 Wheat., 64.

Bank Columbia v. Patterson, 7 Cranch, 299.

Union Bank v. Ridgeley, 1 H. and G., 325.

3. That the publication was not in form or substance a privileged communication.

4. The measure of damages was rightly assigned by the court.  
14 Howard, 438.

5. (a) The jurisdiction is sufficiently alleged.

(b) The question cannot now be raised on the record.

(c) If it could, the facts show jurisdiction as well as the averment.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff, (Quigley,) a citizen of Delaware, complained of the defendants, "a body corporate in the State of Maryland, by a law of the General Assembly of Maryland," for the publication of a libel by them, in which his capacity and skill

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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as a mechanic and builder of depots, bridges, station-houses, and other structures for railroad companies, had been falsely and maliciously disparaged and undervalued. The defendants pleaded the general issue. On the trial of the cause, it appeared that in 1854, the president and directors, then in charge of the affairs of the defendants, instituted an inquiry into the administration and management of a person who had been the superintendent of their railroad for ten years. Among other subjects, the nature of his connection and dealings with the plaintiff, who had likewise been in the service of the corporation as "general foreman of all their carpenters," engaged the attention of the committee of investigation. The president of the company, who conducted the inquiry before this committee on behalf of the corporation, seems to have been convinced that the superintendent had exhibited partiality for the plaintiff, and had allowed him extravagant compensation for service, and the privilege of free transit over the road for himself, his workmen, and freight, to the detriment of the company, and in breach of his duty as superintendent. The superintendent defended himself against these and other imputations, and produced testimony to the skill and fidelity of the plaintiff while in the service of the company; also, to the value of his services, and to the effect that no unusual or improper favor had been extended to him.

The president of the company, in the course of the investigation, addressed a letter to an architect, who had some acquaintance with the plaintiff, to request his opinion of his skill as a mechanic, and whether the services of the plaintiff could have had any peculiar value to a railroad company. The reply of this architect was very pointed and depreciative of the plaintiff, affirming that "he was not entitled to rank as a third-rate workman," and "was unable to make the simplest geometrical calculations." All the testimony collected by the committee, as produced by the superintendent, was carefully reduced to writing, and printed; first, for the use of the president and directors, and afterwards was submitted to the company at their meeting on the 8th of January, 1855, with a report, which exonerated in a great measure the superintendent

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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from any mal-practice in consequence of his relations with the plaintiff. The investigation was searching, and testimony, which, with the report of the committee, fills two printed volumes, was submitted to the company. The letter of the architect, in answer to the letter of the president, is printed in one of these volumes, and this publication is the libel complained of. Several of the directors testify they were not aware of the publication, and evidence was adduced that the plaintiff had declared that the investigation had resulted in increasing his business. A verdict was returned in favor of the plaintiff. The defendants are a company incorporated by the Legislatures of Delaware and Pennsylvania, as well as of Maryland, to construct a railroad to connect the three cities which contribute to form its name, and a portion of their directors and stockholders are citizens of Delaware.

The defendants contend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offence can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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of the States of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society, for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings—mere legal entities, which exist only in contemplation of law—to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives.

With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety. *Trespass quare clausum fregit* was supported in 9 Serg. and R., 94; 4 Mann. and G., 452; Assault and Battery, 4 Gray Mass. R., 465; 6 Ex. Ch., 314. For damages by a col-

*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

tion of rail-cars and steamboats, 14 How., 465; 19 How., 548  
For a false representation, 34 L. and Eq. R., 14; 11 Wheat., 59

The case of the National Exchange Co. of Glasgow v. Drew, (2 Macqueen H. of L. Cas., 103,) was that of a company in failing circumstances, whose managers sought to appreciate its stock by a fraudulent representation to the company, and a publication of the report as adopted by it, that its affairs were prosperous. Two of its stockholders were induced to borrow money from the company to invest in its stock. The question in the cause was, whether the company was responsible for the fraud. In the House of Lords, upon appeal, Lord St. Leonards said: "I have come to the conclusion, that if representations are made by a company fraudulently, for the purpose of enhancing the value of stock, and they induce a third person to purchase stock, those representations so made by them bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company." \* \* \*  
The report "becomes the act of the company by its adoption and sending it forth as a true representation of their affairs; and if that representation is made use of in dealing with third persons, for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those representations."

It would be difficult to furnish a reason for the liability of a corporation for a fraud, under such circumstances, that would not apply to sustain an action for the publication of a libel.

The defendants are a corporation, having a large capital distributed among several hundred of persons. Their railroad connects large cities, and passes through a fertile district. Their business brings them in competition with companies and individuals concerned in the business of transportation. They have a numerous body of officers, agents, and servants, for whose fidelity and skill they are responsible, and on whose care the success of their business depends. The stock of the company is a vendible security, and the community expects statements of its condition and management. There is no doubt that it was the duty of the president and directors to

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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investigate the conduct of their officers and agents, and to report the result of that investigation to the stockholders, and that a publication of the evidence and report is within the scope of the powers of the corporation.

But the publication must be made under all the conditions and responsibilities that attach to individuals under such circumstances. The Court of Queen's Bench, in *Whitefield v. South Eas. R. R. Co.*, (May, 1858,) say: "If we yield to the authorities which say that, in an action for defamation, malice must be alleged, notwithstanding authorities to the contrary, this allegation may be proved by showing that the publication of the libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill will to the plaintiffs, and did not mean to injure them." And the court concluded: "That for what is done by the authority of a corporation aggregate, that a corporation ought as such to be liable, as well as the individuals who compose it."

The question arises, whether the publication is excused by the relations of the president and directors, as a committee from their board, to the corporation itself. It cannot be denied that the inquiries directed by those officers were within the scope of their power, and in the performance of a moral and legal duty, and that the communication to their constituents of the evidence collected by them, and their conclusions upon the evidence, was a privileged communication in the absence of any malice or bad faith. But the privilege of the officers of the corporation as individuals, or of the corporate body, does not extend to the preservation of the report and evidence in the permanent form of a book for distribution among the persons belonging to the corporation or the members of the community. It has never been decided that the proceedings of a public meeting, though it may have been convened by the authority of law, or of an association engaged in an enterprise of public utility, could be reported in a newspaper as a privileged publication. But a libel contained in such proceedings, if preserved in the form of a bound volume, might be attended with more mischief to private character than any publication in a newspaper of the same document



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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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The opinion of the court is, that in so far as the corporate body authorized the publication in the form employed, they are responsible in damages. The Circuit Court instructed the jury:

1. If the jury find, from the evidence in this case, that the defendants, by the president and directors of said company, published the letter from John T. Mahoney to S. M. Felton, president, &c., dated March 3d, 1854, in the declaration mentioned, and that any or all of the statements in the said letter respecting the plaintiff in his trade and occupation are false; and shall further find, that the said president and directors, at the annual meeting of the stockholders of said company, held 8th January, 1855, reported to the said stockholders their action in the premises, and that the proceedings of the committee of investigation (which contained the said letter) were then being printed, and, as soon as printed, would be distributed to the stockholders, and that said report was accepted by the stockholders; and if the jury shall further find, that, after the meeting of the stockholders had adjourned, the president and directors of said company distributed the book containing the said letter among the stockholders of this company, or any of them, then the jury may find for the plaintiff.

2. And if the jury find for the plaintiff under the first instruction, they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstances in this case, to render reparation to plaintiff, and act as an adequate punishment to the defendant.

The first instruction is erroneous, because the publication to which the court referred as blameworthy, and to authorize the jury to find a verdict against the defendant, took place after the commencement of this suit.

The second instruction contains the same error, and is objectionable for the additional reason that the rule of damages is not accurately stated to the jury.

In *Day v. Woodworth*, 18 How. S. C. R., 371, this court recognised the power of a jury in certain actions of tort to assess

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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but confine the cognizance of the courts to controversies between *citizens* of different States, sustaining their full natural, political, and social relations. This was the object attempted in the case of the Cincinnati Railroad Company and Letson, in the 2d of Howard. It then became necessary to give to this *citizen corporation* a local habitation or residence, in order to fix his origin and position, on which it was, and is yet, perhaps, conceded, that his admission into the courts of the United States was dependent; and this court, to accomplish this purpose, seems to have settled upon one or the other of the following conclusions, or perhaps in part on both: that either the locality within which this *citizen* may be fabricated, or that within which his agents or factors (*viz*: the president and directors) hold their place of business, determines his political position, his capacities and responsibilities, although it is palpable this latter conclusion abrogates completely the previous doctrine of this court, that the rights and powers of a corporation remain and inhere in the individuals interested in the company, and do not appertain regularly to the associated or organized body. From these anomalous conclusions have arisen the curious formula in pleading, by which access has been sought and permitted in the courts of the United States—as for instance, *a certain company, a body corporate, created by some stated authority, but without averring citizenship or residence on the part of that body, but leaving these to be implied by the court, sues or is sued.* In the case under review, the party defendant below is averred to be the Philadelphia, Wilmington, and Baltimore Railroad Company, a body corporate in *Maryland*, incorporated by a law of Maryland. Here, then, is averred neither citizenship, nor an identity with, nor an equivalent for citizenship, nor residence, nor commorancy anywhere, on the part of the defendant. The corporate body is stated to be in *Maryland*, but whether in its organized constitution, or by the citizenship of its president and directors, or by its individual members, or whether in either character it is or is not of *Maryland*, is left to the court to supply; and this, too, in defiance of the unbroken chain of decisions from 3 Dallas, 882, down to 6 Wheaton, p. 450, comprising twelve distinct cases,

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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ruling, *in totidem verbis*, that under the second section of the third article of the Constitution, not only must the parties to suits in the Federal courts be citizens and inhabitants of different States, but that this character must be averred expressly, and must appear upon the record, and cannot be *inferred from residence or locality*, however unequivocally stated; and that the failure to make the required averment will be fatal to the jurisdiction of a Federal court, either original or appellate, and is not cured by the want of a plea or of a formal exception in any form, and that even the party who is guilty of the irregularity may avail himself of it upon appeal.

This case is marked by peculiarities, which, if they can, consistently with the rules of pleading and evidence, be regularly brought into view, will show more clearly than has hitherto been done the effects of the anomalous proceedings above adverted to. It is ruled by all the cases, that where want of jurisdiction in the Federal courts is apparent on the face of the pleadings, the courts, original and appellate, are bound to take notice of this defect, and that there can be no requisition on parties to show it either by averment or proof. The establishment of this principle certainly dispenses with the necessity for proofs in such a case, for why undertake to establish by proof that which is admitted? Moreover, the character of the defect partakes more, perhaps, of matter of law than of fact. Hence it may be questionable, how far the introduction of any evidence, and still more of cumulative evidence, is or was admissible to show this admitted or patent defect, which it has been so often ruled that the court must take notice of without plea or demurrer. But we see by the record, that evidence, extensive and documentary, was introduced as to this point, and read without objection. And to what conclusions does this evidence, if admissible, inevitably lead? According to the decisions previously made here with respect to corporations—according, too, to the argument of counsel for the defendant in error—the Baltimore Railroad Company was created separately and exclusively by the State of Maryland, and its attributes of suing or being sued, and every other attribute or function, was imparted and perfected by that separate authority, which was

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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limited by the power of Maryland. So, too, the Philadelphia Railroad Company was separately and independently created by Pennsylvania; and, in like manner and with like effect, the Delaware Railroad Company, by the State of Delaware. Neither of the States just mentioned had the power to create a citizen of another State, nor to create or invest any attribute or right of citizenship beyond its own jurisdiction. It follows, then, that the incorporation of these companies was in each a separate, independent, and distinct and complete act, operating only within the sphere of the legitimate authority that performed it, and any right or attribute of citizenship it could confer, would be imparted to its own subjects alone; it could not determine the polity of other communities, or the rights of their people. But, by some professional magic, these three separate creations, which, if invested with any of the qualities of citizenship, were necessarily circumscribed as to these by the authority of their respective States, are here converted into one. These three *quasi* citizens of different States are transformed into one; and, although three-fold in form, less than one; and by this transformation are brought into tribunals where real citizens are not permitted to litigate without averring, and if denied, not without proving the truth and reality of their character in obedience to the command of the Constitution. In the present instance, this may subserve the convenience of the individual, but in another aspect the mischiefs incident to such a relaxation would be apparent and serious. It would be putting it in the power of separate corporations, deriving their origin from distinct sources by claiming a joint name or title, to select at will, for its purposes, a forum within that jurisdiction, within which either corporate body was created. The averments of citizenship and residence being dispensed with by this court, no check is left to such a combination and irregularity; and by this practice there is extended to artificial bodies, which are not, and cannot, from the nature of things, be citizens, privileges which belong by the Constitution to citizens only, and upon proof, if required, of the reality of their character as such.

It has just been remarked that the arguments against the

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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jurisdiction of the Federal courts over corporate bodies may be found in some of the opinions delivered in the case of Marshall against the Baltimore and Ohio Railroad Company, and it is said that these arguments it is unnecessary to repeat, and it is seen that they have not been deemed of sufficient cogency to prevent a concurrence in proceedings and pretensions which those arguments were urged to condemn.

The relevancy or the justice of the above declaration I confess myself somewhat at a loss to comprehend. If it be intended by way of recantation, prompted by a conviction of the unsoundness of those arguments, and as a criticism upon those who are unable to chime in with the notes of such a palinodia, it would seem to me that a direct avowal of that conviction, and of the consequences to which it had led, would have been nothing more than justice to all. If, on the other hand, the soundness of those arguments is still regarded as a regular deduction from constitutional principle, and from fealty to the Constitution, then a relinquishment of those arguments, or the failure to assert them on every occasion similar to that first calling them forth, however justifiable in the view of others, would in myself, by myself, be felt as a compromise of a sacred and solemn duty. The vindication of truth, whenever we shall be called on to speak or to act, can never, in my opinion, be properly shunned; I, therefore, am bound to reassert all which I have endeavored earnestly, however feebly, to maintain, and which I still believe.

I am further of the opinion, that apart from any question as to the peculiar jurisdiction of the Federal courts, this action could not be maintained in any *forum* possessing even general legal powers. It is to be borne in mind, that the proceedings in this case are not founded upon any express or peculiar right or authority vested by statute or other special and competent power, but are claimed as the legitimate consequences inherent in, and flowing from, the nature and constitution of corporations aggregate. By those who affirm this doctrine it is indispensable that they should show as inherent in, and consistent with, the constitution of such corporations, the attributes and qualities to which proceedings like the present are calcu-

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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lated to apply, and with which they can, by any rational or logical comprehension, be made applicable. The metamorphosis which would transmute an aggregate corporation into a natural person, must necessarily transfuse into this new creation the capabilities and qualities of the being into which it is changed. Upon any other hypothesis, the fact of identity could not be. Natural persons are capable of the passions of love and hate; can contend in mortal combat by duel or otherwise; can go into the field in command of armies; can sit upon the bench of justice, or in the legislative or executive departments of the Government. According to this transmutation theory, all these qualities are imparted to its new *promethean* experiment, who, of course, could he be only apprehended or laid hold of, might, like his prototype—or, more properly, his other self—be subjected for the misuse of those qualities to the extremest penalties of the law, the scaffold or the gallows. To my apprehension, this theory involves the confounding of all political, legal, moral and social distinctions. By that apprehension, derived from the definitions of corporations aggregate, as given by Brooke, Coke, and Blackstone, and by the express language of this tribunal in the earlier cases decided by it, these bodies are regarded as merely artificial—a species of *fictiones juris*, created for particular objects, and vested certainly with no greater or higher attributes than the creator of those bodies has power to bestow. Man can have no power to confer mind, passion, or moral perception, nor moral powers, upon a mere fabrication of his own—a mere piece of parchment or paper. No *quo animo*, therefore, can be affirmed of a fiction to which no *animus*, or passion, or moral quality, can be imparted.

It has ever been admitted, that into slander or libel, malice essentially enters. Slander or libel is an injury inflicted with a wicked or malevolent motive. Reason and common sense would hence conclude, that where there could be motive of no kind whatsoever, there could be no malice, and therefore no offence, of which malice is the essential, the leading and distinguishing characteristic.

In several of the English cases it has been ruled, that trover

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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and trespass *quare clausum fregit* may be maintained against a corporation; and this, with respect to the latter action, is going a great way, as it is not very easy to explain in what mode a mere fiction or legal faculty can act *vi et armis*; yet a conceivable distinction may be taken between acts injurious in their effects and viewed as mere facts, and performed independently of or without motive, and for which the actor is bound to make reparation, and conduct the character of which lies exclusively in the motive, and which, apart from such motive, can neither exist nor be conceived.

In conformity with these conclusions is the opinion of Alderssen Baron, as late as the year 1854. (Vide 10 Exchequer Rep. 356; *Stevens v. Midland Counties Railway Co.*)

But a precedent for the affirmation of such a legal, physical, and moral anomaly as an act to be characterized and appreciated by a quality which by no possibility can appertain to it, is relied upon in this case; and so far as that precedent is comprehended, it seems designed, at any rate, for an application like the one made of it in this cause. It is believed, however, to be a solitary precedent; and as the force of that precedent (owing, perhaps, to no fault in his Lordship's reasoning, but in those who are incapable of understanding his logic) is not very clearly apprehended; and as it most certainly contravenes the course of decision for centuries, the presumption of not yielding implicitly to the ruling of a Lord Chief Justice may perhaps be pardoned. This precedent is found in the case of *Whitfield et al. v. The Southeastern Railway Company*, just cited from the bench. That was an action for a *libel*, and the declaration was demurred to, for the reason that *malice* could not be affirmed of a corporation aggregate.

His Lordship says: "The demurrer to the declaration in this case can only be maintained on the ground that the action will not lie without proof of *express* malice, as contradistinguished from *legal* malice."

How is this expression of his Lordship to be understood? The averment of malice, and the application of that averment to the defendants, was a question arising upon the pleadings, and upon the character or capacity of the party complained of,

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*Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*

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as disclosed upon the face of the declaration. Whether malice, either *express* or *implied*, could be imputed to the plaintiff, could have no influence *a priori*; if *malice* was alleged, it opened at once the only legitimate question arising upon the demurrer, viz: could the defendants be guilty of malice? The character or the degree of malice was a question arising upon the proofs, and was the proper subject for the instructions from the judge. It would be difficult to find a precedent in pleading, wherein a distinct averment as to *express* or *implied* or legal malice was made.

His Lordship proceeds: "But if we yield to the authorities which say that in an action for defamation malice must be alleged, notwithstanding authorities to the contrary." And here, with a willingness always to be instructed, I would gladly learn what authorities those are to which reference is thus made; for within the sphere of my own inquiries, going as far back as Owen, 51; Noy, 85; 1 Saunders, 242; 4 Bur., 2428; 3 Taunton, 246; and coming down to 8 Adolph. and Ell., 652; 1 Maule and Selwin, 639, it is held, without a dissentient, that the declaration must show a malicious intent in defendant; and although the word *maliciously* is not absolutely necessarily requisite, yet words of equivalent import must be used; and it is said that the usual and better form of pleading is, *falsely* and *maliciously*. (Vide 1 Rep., 273.)

His Lordship further proceeds, or is made to say: "This allegation may be proved, by showing that the publication of the libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill will to the plaintiffs, and did not mean to injure them. Therefore, (*note the conclusion,*) "The ground on which it is contended that an action for a libel cannot be maintained against a corporation aggregate fails." He who can connect this corollary with the premises surpasses any ingenuity of mine.

To return to his Lordship's argument:

"This allegation may be proved." What allegation, we ask? Why, the *libel*, a *malicious* publication, "by showing that it took place by order of the defendants, although the defendants had no ill will to the plaintiffs, and did not intend to injure them." Thus it is said to be the law, that a libel may exist



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*Campbell et al. v. Boyreau.*

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without an unfriendly intention; and with equal reason might it be alleged or imputed where the intention was amicable.

I give the concluding reasons ascribed to his Lordship for his decision. They are as follows:

"I may mention, that corporations aggregate are now so common, that I believe that a public journal is conducted by a corporation aggregate limited. Therefore, it seems to us, that for what is done by the authority of a corporation aggregate, that a corporation aggregate ought, as such, to be liable as well *perhaps* as the individuals. *Therefore*, we think there ought to be judgment for the plaintiffs."

The connection between the number of aggregate corporations and their capacities or liabilities, and the dependence in any degree of the one upon the other, I leave to those who have been favored with greater perspicacity than has been given to me. I am wholly unable to perceive them.

In fine, with due respect for others, and with becoming diffidence of myself, I am constrained to say, of the opinion in the case of *Whitfield v. The Southeastern Railway Company*, as it has been brought to the view of this court, that in its arguments and conclusions it is confused and obscure; and is incongruous and contradictory, both in its reasoning and its conclusions. In the line of English adjudications it presents itself as solitary and eccentric, and in opposition to the most inveterate, the clearest, and reiterated distinctions announced by the sages of the law—distinctions having their foundation in reason and in the essential character of the subjects to which those distinctions have been applied. I cannot yield to that opinion my assent. I think, therefore, that for either of the objections before assigned there should be added to the reversal of the judgment of the Circuit Court an order for a dismissal of the suit.

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WILLIAM CAMPBELL AND THIRTY-SEVEN OTHERS, PLAINTIFFS IN  
ERROR, v. CLEMENT BOYREAU.

This court has heretofore decided, in several cases, that, in order to bring the questions of law before this court by writ of error, the facts must be found in

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*Campbell et al. v. Boyreau.*

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the court below by a jury, by a general or special verdict, or must be agreed upon in a case stated.

And also, that where the parties agree that the court shall decide questions both of law and fact, none of the questions decided, either of fact or law, can be reviewed by this court on a writ of error.

The practice in Louisiana is an exception to this general rule, as that practice is sanctioned by the act of Congress which requires the courts of the United States to conform to the practice of the State courts.

THIS case was brought up by writ of error from the Circuit Court of the United States for the northern district of California.

The case having been decided by this court upon a point of practice, it is necessary to state only so much of it as to show how the point of practice arose.

It was a suit in the nature of an ejectment, brought by Boyreau to recover all the undivided half of an undivided eighteenth part of that certain tract of land, rancho, or farm, known as the "Rancho San Leandro," situate in the county of Alameda, State aforesaid, bounded as follows: on the north by the San Leandro creek; on the west by the bay of San Francisco; on the south by the San Lorenzo creek; and on the east by a line commencing on the southern bank of the San Leandro creek, at a point on said bank, from whence a line bearing south, 29 degrees east, will strike the eastern bank of a lagoon, situated about six or seven chains south of said creek, thence running on said line about two hundred and sixty-two (262) chains, parallel with a ridge of hills running from the San Leandro creek to the San Lorenzo creek, at a point at the base of the foot hills on the said creek.

Upon the trial, the whole case was submitted to the court, a jury being expressly waived by agreement of parties; and the evidence and arguments of counsel being heard, the court proceeded to find a long history of facts, which is set forth in the record. The copy of the grant offered in evidence excluded land on the east occupied by the Indians, and the court, in its finding, ran the east line in such a way as to exclude two of the defendants, who were pronounced not guilty. All the evi

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*Campbell et al. v. Boyreau.*

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dence necessary for the court to make up its opinion upon this point, and also upon other facts in the case, would seem to belong more appropriately to a jury. The second bill of exceptions contained the elaborate opinion of the court, in which questions of fact and questions of law were all decided.

The case was argued for the defendant in error in this court by *Mr. Brent* and *Mr. Crittenden*, who, upon the point in question, contended that the finding by the court of the facts was as binding on the plaintiffs in error as if the facts were stated in a special verdict.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an action of ejectment (although the pleadings are not in the form prescribed by the common law) to recover a tract of land called *San Leandro*, situated in California. It was brought in the Circuit Court of the United States for that district. The parties agreed to waive a trial of the facts by a jury, and that the facts as well as the law should be decided by the court, upon the evidence adduced by the parties.

In pursuance of this agreement, evidence was offered on both sides; and the court proceeded to decide the facts in dispute, and then proceeded to decide the questions of law arising on the facts so found by the court; and finally gave judgment against the plaintiffs in error, who were defendants in the court below. And this writ of error is brought to revise that judgment.

It appears by the transcript that several exceptions to the opinion of the court were taken at the trial by the plaintiffs in error—some to the admissibility of evidence, and others to the construction and legal effect which the court gave to certain instruments of writing. But it is unnecessary to state them particularly; for it has been repeatedly decided by this court, that, in the mode of proceeding which the parties have seen proper to adopt, none of the questions, whether of fact or of law, decided by the court below, can be re-examined and revised in this court upon a writ of error.

It will be sufficient, in order to show the grounds upon which

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*Campbell et al. v. Boyreau.*

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this doctrine has been maintained, and how firmly it has been settled in this court, to refer to two or three recent cases, without enumerating the various decisions previously made, which maintain the same principles. The point was directly decided in *Gould and others v. Frontin*, 18 How., 135; which, like the present, was a case from California, where a court of the United States had adopted the same mode of proceeding with that followed in the present instance. And the decision in that case was again reaffirmed in the case of *Suydam v. Williamson and others*, 20 How., 432; and again in the case of *Kelsey and others v. Forsyth*, decided at the present term.

Indeed, under the acts of Congress establishing and organizing the courts of the United States, it is clear that the decision could not be otherwise; for, so far as questions of law are concerned, they are regulated in their modes of proceeding according to the rules and principles of the common law, with the single exception of the courts in the State of Louisiana, of which we shall presently speak. And by the established and familiar rules and principles which govern common-law proceedings, no question of the law can be reviewed and re-examined in an appellate court upon writ of error, (except only where it arises upon the process, pleadings, or judgment, in the cause,) unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court.

The finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognised as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the

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*Campbell et al. v. Boyreau.*

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court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed.

The cases referred to in the argument, which were brought up by writs of error to a Circuit Court of Louisiana, do not apply to this case. The act of Congress of May 26, 1824, (4 Stat., 62,) adopted the practice of the State courts in the courts of the United States. And a writ of error to a Circuit Court of that State, therefore, is governed by different principles from a like writ to the Circuit Court of any other State. And as, by the laws of Louisiana, the facts, by consent of parties, may be tried and found by the court without the intervention of a jury, this court is bound, upon a writ of error, to regard them as judicially determined, and treat them as if they had been found by the special verdict; and the questions of law which arise on them are consequently open to the revision of this court.

But the practice in relation to the decisions in that State is an exception to the general rules and principles which regulate the proceedings of the courts of the United States; nor can the laws or the practice of any other State authorize a proceeding in the courts of the United States different from that which was established by the acts of 1789 and 1803, and the subsequent laws carrying out the same principles and modes of proceeding.

Upon the grounds above stated, the judgment in this case

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*Lessee of French and Wife v. Spencer et al.*

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must be affirmed. But it must at the same time be understood that this court express no opinion as to the facts or the law as decided by the Circuit Court, and that the whole case is open to re-examination and revision here, if the questions of fact or law should hereafter be brought legally before us, and in a shape that would enable this court to exercise its appellate jurisdiction.

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LESSEE OF WILLIAM C. FRENCH AND WIFE, PLAINTIFF IN ERROR, v. WILLIAM H. SPENCER, JUN., JOSEPH SPENCER, AND ANNA A. SPENCER.

By an act of Congress passed in 1816, (3 Stat. at L., 256,) a bounty in land was given to those American citizens who were living in Canada at the time when war was declared against Great Britain, in 1812, and who returned to the service of their country.

This act was not like other bounty-land acts, by which the Government undertook to locate the bounty land. Under the act first mentioned, the warrants were delivered to the owners to be located by them, and were therefore assignable after an entry was made in the Land Office.

The deed of conveyance in question was sufficient to pass the interest of the grantor.

A patent issued to the original beneficiary, who had previously sold his right, enured to the benefit of the purchaser, and related back to the date of the entry; and the heir of the grantor in such a deed is estopped from setting up a legal title under the patent.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was an ejectment brought by French and wife, to recover an undivided half of three hundred and twenty acres of land in the county of Vigo, in Indiana.

Upon the trial, the evidence offered by the plaintiff was as follows:

1. Evidence that one Silas Fosgit, who had been a Canadian volunteer in the army of the United States in the last war with Great Britain, had died between the 28th of June, 1816, and the 29th day of June, 1823, and that his only heirs at law were Minerva French, (wife of said William C. French,) residing in the State of Michigan, and one Aruna Fosgit.

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*Lessee of French and Wife v. Spencer et al.*

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2. A copy of a patent, dated on the 26th of October, 1816, to Silas Fosgit, for two quarter sections of land in the district of Vincennes.

The evidence offered by the defendants was as follows:

1. The original patent above mentioned, which had been deposited by one Abraham Markle with George Horner in 1817, who delivered the same to the defendants in 1854.

2. Evidence that they were the only children and heirs at law of one William H. Spencer, sen., who died in 1852, and also that the warrant was located upon the lands in dispute, by Abraham Markle, on the 3d of June, 1816.

3. The deed or assignment from Fosgit to Spencer, duly proved. As the court considered this assignment sufficient to convey the land, it may be as well to insert it, viz:

“Whereas I, the undersigned, Silas Fosgit, late a private in the corps of Canadian volunteers, commanded by Lieutenant Colonel Joseph Wilcox, deceased, lately in the service of the United States of America, according to the provisions of an act of Congress of the United States of America, passed March 5th, 1816, entitled ‘An act granting bounties in lands and extra pay to certain Canadian volunteers,’ having applied for, have obtained a warrant, issued by the Secretary of the Department of War, for the location of three hundred and twenty acres of land within the Indiana Territory, agreeably to the directions of said act:

“Now, know all men by these presents, that I, the said Silas Fosgit, for and in consideration of the sum of five hundred dollars to me in hand paid by William H. Spencer, Esquire, of Genesee, in the county of Ontario, and State of New York, the receipt whereof I do hereby confess and acknowledge, have assigned and set over, and by these presents do grant, bargain, sell, transfer, assign, and set over, to said William H. Spencer, his heirs and assigns, forever, the said three hundred and twenty acres of land; to have and to hold the same, in as full and ample manner as I, the said Silas Fosgit, my heirs or assigns, might or could enjoy the same by virtue of the said warrant or otherwise. And I do, for myself, my heirs and assigns

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*Lessee of French and Wife v. Spencer et al.*

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hereby authorize and empower the said William H. Spencer, his heirs and assigns, to make location of the said lands under and by virtue of the said warrant, and agreeably to the directions of the said act; and upon location thereof being made as aforesaid, to demand and receive a patent or deed of and for the said lands, in his own name, and for his sole use, benefit, and behoof; to the which end and intent I, the said Silas Fosgit, have and do make, ordain, constitute, and appoint the said William H. Spencer, his heirs and assigns, my true and lawful attorney and attorneys, irrevocable, to ask, require, demand, and receive the said deed or patent of and for the said land, and also to make location thereof, and one or more attorney or attorneys under him to constitute; and whatsoever the said William H. Spencer or his attorney or attorneys shall lawfully do in the premises, I, the said Silas, do hereby allow and confirm.

"In testimony whereof, I have hereunto set my hand and seal, this 28th day of June, 1816.

"SILAS FOSGIT. [SEAL.]

"In presence of—

GEORGE HORNER."

The counsel for the plaintiff objected to the reading of this deed in evidence, for the following reasons, viz:

1. Because said writing is upon its face void, as being in violation of the acts of Congress touching the subject of bounties in lands for military services, and against the public policy of the United States on that subject.

2. Because said writing, on a fair legal construction of its terms, conveys no legal title (and, indeed, no title at all, of any kind) to the lands in question.

8. Because said writing is irrelevant, and incompetent as evidence in this cause.

But the court allowed it to be read, and instructed the jury that it furnished a conclusive defence to the action. Whereupon the plaintiff objected, and brought the case up to this court.

It was argued by *Mr. Thompson* for the plaintiff in error, and by *Mr. Bennett* for the defendants in error.



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*Lessee of French and Wife v. Spencer et al.*

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The counsel for the plaintiff in error contended that the warrant was not assignable by the acts of Congress, under which it was issued; that the deed was not, in point of fact, an assignment of the warrant; that the warrant had been located on the 3d of June, twenty-five days before the paper was executed; that the paper did not amount to a conveyance of land; that it did not purport so to be; and that, if it were intended to be a deed of conveyance, it was void for uncertainty in the designation and description of the land. Upon the point whether the assignment related back to the date of the entry, the counsel for the plaintiff remarked:

But if it had been designed as a deed of conveyance, it did not convey the legal estate to Spencer, for Fosgit, at that time, had no such estate to convey. He could convey no higher estate than he had, and, if he had none in the particular land, he could convey none.

Coke, sec. 446.

Hillard's Ab., 309, sec. 25.

The patent was not issued until October 26, 1816—four months *after* this paper was executed—and, until then, the legal title was in the United States.

Foley v. Harrison, 15 How., 447.

Dubois v. Newman, 4 Wash. C. C. R., 77.

Wilcox v. Jackson, 13 Pet., 516.

Green v. Lister, 8 Cranch, 229.

Irvine v. Marshall & Barton, 20 How., 558.

If the legal title was in the United States till October 26, 1816, this paper could not have conveyed such a title to Spencer, on the 28th of June before that, as would have availed him then, or his heirs now, in an action of ejectment.

Baynel v. Broderick, 13 Pet., 436.

It is of no avail to say that, the moment the entry was made, the title so vested in Fosgit as that he could convey. What title? Not the *legal* title, certainly, for that, upon the authority of the foregoing cases, was in the United States. The most that could be claimed for him would be a mere equity; and it might well be questioned, if it were necessary in this action, whether he had even an equitable title to any particular land.

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*Lessee of French and Wife v. Spencer et al.*

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The language of the act granting these bounty lands is, that the party "shall be entitled to three hundred and twenty acres," &c. This *grants* nothing; no title passes by it. He shall be entitled to it when he shall get a warrant, select the land, have the selection confirmed, and get a patent. *All* this has to be done before he can have any title at all, and, until it is done, the title remains in the Government. If, therefore, he could sell or assign anything before all this was done, it could not be any title *in the land*, whatever else it might be.

If, then, this instrument is a deed of conveyance at all, it conveys at most but an equity, which does not avail the defendants in this action. If that were conceded to be its import, it would amount to nothing more than an executory contract to convey the legal estate, at some future time.

But, again, if it is conceded to be a deed of conveyance, it is a quit-claim merely, by which Fosgit parted only with the equitable estate he possessed at its date. Therefore, the Circuit Court erred in deciding that the subsequent legal estate which Fosgit acquired by the patent had relation back to the date of this instrument, and ripened the equity which Spencer acquired thereby into a legal title. A subsequently-acquired estate does not pass where there are no covenants of title.

Van Renssellear v. Kearney, 11 How., 297.

Pelletren v. Jackson, 11 Wend., 116.

Jackson v. Waldron, 13 Wend., 212.

The United States never parted with the legal title to this land till the patent was issued, October 26, 1816. By that act, the title passed to Fosgit, and consequently must remain in his heirs, unless conveyed away by him or them. It is not pretended that this has been done by the heirs, and Fosgit himself could not have done it, *before he had it*, except by deed with warranty of title. He made no such deed.

It is, however, insisted that it is to be *presumed*, from lapse of time, that the legal estate has been conveyed to Spencer. This abandons the ground that the instrument of June 28, 1816, is a conveyance, and treats it as an executory contract to convey, and yields the point upon which the case was decided in the Circuit Court.

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*Lessee of French and Wife v. Spencer et al.*

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This *presumption*, that a deed was executed by Fosgit to Spencer, does not arise in the case as it now stands. The case turned, in the court below, upon the single question of the validity and effect of the paper of June 28, 1816; and both the instruction of the court and the bill of exceptions show this. It will be an easy matter to show that no such presumption can be indulged in this case, if that question shall ever arise. There is nothing to base it upon. It is not shown that *twenty* years have elapsed since Fosgit was in a condition to execute the agreement to convey.

8 Phill. on Ev., Cow. and Hill's Notes, 505, and cases cited.

Nor that he ever knew that the legal estate had passed to him by the issuance of the patent, or that, after his death, his heirs ever knew it. The disability and ignorance of the party always repel presumptions.

8 Phill. on Ev., C. and H.'s Notes, 497.

8 John. C. R., 129.

Hurst's Lessee v. McNeil, 1 Wash. C. C. R., 70.

Henderson v. Hamilton, 1 Hall's Rep., 314.

And, besides all this, there is no pretence of twenty years possession, claiming under *adverse* title.

8 Phill. on Ev., C. and H., 496, and authorities cited.

8 Green. R., 120.

But, until this question shall properly arise, it will be premature to discuss it.

The counsel for the defendants in error made the following points upon the leading questions decided by this court:

I. By the issuing and location of his warrant for three hundred and twenty acres, Fosgit had title to the land, under the act "granting bounties to the Canadian volunteers;" and his deed to Spencer, who paid him five hundred dollars for it, was valid and effectual, as between the parties, to convey his right and title, even if no patent had ever issued. And the law was so held at the time. (No patent was required under this act; the grant, the warrant, and location, made the title perfect.)

Statutes, vol. 8, p. 256.

Laws of Indiana, 1807, 539, ch. 38.

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*Lessee of French and Wife v. Spencer et al.*

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18 Peters, 498; 2 Wheaton, 196.

8 Ohio R., 107; 16 J. R., 172, 178.

8 J. R., 315, 60, 81; 10 J. R., 456.

8 Stat. at Large, 641.

II. The patent was merely a formal (and unnecessary) evidence of this title, and, when issued, related back to the date of the act, (or the entry upon the land,) and would inure to the benefit of a *bona fide* purchaser.

8 Caines R., 62; 2 J. R., 80.

12 J. R., 140; 3 McLean's R., 109.

10 How., 372, 373; 5 Port., 237, 245.

III. Fosgit and his heirs are *estopped* from disputing Spencer's title.

1. By the deed.

11 How., 322, 323, 325; 6 Ind. R., 128.

7 How., 430; 9 Wend., 229.

1 Barb., 610; 4 Denio, 480.

3 Comstock, 276; 18 How., 82, 85.

The recitals in the deed to Spencer are equivalent to an assertion that Fosgit had title to the three hundred and twenty acres of land which he conveyed to Spencer. By this, Fosgit and his heirs are bound as much as if the deed contained a covenant of warranty.

11 How., 322, 323, 325; 18 How., 82, 85.

A deed, with covenants, would have passed an after-acquired title. This deed is just as effectual, for it estops the plaintiff from asserting an after-acquired title against defendants.

2. By receiving and retaining the five hundred dollars paid by Spencer for the land.

7 Harris, 430; 8 Wend., 480.

2 Hill, 64; 1 Denio, 169.

2 Denio, 139; 3 J. Ch. R., 23.

3. By the irrevocable power of attorney given to Spencer, that he might require and receive any further deed or patent necessary to secure his title for his "sole use and benefit." This patent, when obtained, was to be for Spencer's benefit. Attempting to use it for Fosgit's was a fraud, and the doctrine of *estoppel* applies. The instructions of the court were therefore right

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*Lessee of French and Wife v. Spencer et al.*

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6 Indiana R., 128, 289; 7 do., 301.

IV. The deed was not in violation of any act of Congress. The act "granting land to the Canadian volunteers" did not forbid a transfer of the warrant or a sale of the land.

Statutes, vol. 3, p. 256.

The acts afterwards passed do not include the Canadian volunteers, but are confined to *enlisted* soldiers. This is conceded as to all acts framed before April 16, 1816. That act could not defeat the vested rights acquired under the act of March 5, 1816.

7 John., 477; 7 Barb., 445.

The act of 16th April, 1816, does not embrace the Canadian volunteers. A special act providing for a particular case is not changed by general words in another act; effect should be given to both. It applies only to soldiers *enlisted* during the late war.

8 Stat. at L., 287, sec. 5.

A prohibition against assigning the *warrant*, or selling the *land*, after the grant was made, would have been void.

It would have improperly interfered with private property and vested rights.

Congress settled this question by the act of 8d March, 1821.

8 Stat. at L., 641; 1 Indiana R., 342.

This act, in effect, declared the opinion of the Attorney General wrong. It confirmed all assignments or sales of the Canadian volunteers. It was a declaratory act of what the law was, and was as valid and effectual as to sales made before or after its passage.

If this act cannot have a retrospective effect, how can the act forbidding the sales or assignments, passed after the grant was made? If both relate back, or if neither relate back, defendants' rights are protected. But the act forbidding a transfer applies only to *enlisted* sailors.

Besides, Fosgit, by his agent, Markle, had located the land. He did not sell the warrant to Spencer, but the "three hundred and twenty *acres of land*;" and there is no act of Congress preventing any man from selling his land which he has selected and located, and a right to take and hold, and which he has

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*Lessee of French and Wife v. Spencer et al.*

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taken possession of. Congress has no power to pass such an act, nor is there any decision to be found that a patent, when afterwards issued, in such a case, would not inure to the benefit of a *bona fide* purchaser.

36 Maine, 448.

Mr. Justice CATRON delivered the opinion of the court.

Silas Fosgit obtained a warrant for three hundred and twenty acres of land as a Canadian volunteer in the war of 1812 with Great Britain. This warrant he caused to be located in the Indiana Territory, June 3, 1816, on the land in dispute. On the twenty-eighth day of that month he conveyed the land to William H. Spencer, who died in possession of the same; it descended to his children and heirs, who continued in possession, and are sued in this action by one of the two heirs of Fosgit, who died about 1823. A patent was issued by the United States to Fosgit, dated in October, 1816. The deed from Fosgit to Spencer was offered in evidence in the Circuit Court, on behalf of the defendants, and was objected to:

1st. Because it is void on its face, being in violation of the acts of Congress touching the subject of bounty land for military services, and against the policy of the United States on that subject.

2d. Because said writing, on a fair legal construction of its terms, conveys no legal title (and indeed no title at all, of any kind) to the lands in question; and

3d. Because said writing is irrelevant, and incompetent as evidence in this cause.

The court overruled the objections, and permitted the defendants to give the writing in evidence, and instructed the jury that it was a complete defence to the action; to all of which the plaintiff excepted.

1. Was the writing void because it was in violation of acts of Congress touching the sale of bounty lands before the patent had issued? This depends on a due construction of the act of 1816. It gave to each colonel nine hundred and sixty acres; to each major eight hundred acres; to each captain six hundred and forty acres; to each subaltern officer four hundred acres;

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*Lessee of French and Wife v. Spencer et al.*

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to each non-commissioned officer, musician, and private, three hundred and twenty acres; and to the medical and other staff in proportion to their pay, compared with that of commissioned officers. Warrants were ordered to be issued by the Secretary at War, subject to be located by the owner, in quarter sections, on lands within the Indiana Territory, surveyed by the United States at the time of the location. And three months additional pay was awarded to this description of troops.

By the acts of 1811, ch. 10, 1812, ch. 14, sec. 12, and that of May 6, 1812, ch. 77, sec. 2, it was provided that each private and non-commissioned officer, who enlisted in the regular service for five years, and was honorably discharged, and obtained a certificate from his commanding officer of his faithful service, should be entitled to a bounty of one hundred and sixty acres of land; and that the heirs of those who died in service should be entitled to the same, to each of whom by name a warrant was to issue. The act of May 6, 1812, provided for surveying, designating, and granting these bounty lands; the fourth section of which declares that no claim for military land bounties shall be assignable or transferable until after the patent has been granted; and that all sales, mortgages, or contracts, made prior to the issuing of the patent, shall be void; nor shall the lands be subject to execution sale till after the patent issues.

It is insisted that this provision accompanies and is part of the act of 1816, and several opinions of Mr. Attorney General Wirt are relied on to sustain the position that the acts granting bounty lands are *in pari materia*, and must be construed alike. He gave an opinion in 1819, (2 L. L., and Opinion 6,) that a land warrant issued to a Canadian volunteer was not assignable on its face, or in its nature, and consequently that the patent must issue in the name of the soldier. But he did not decide, nor was he called on to do so, that, after the warrant had been located and merged in the entry, that the equitable title and right of possession to the land could not be transferred by contract.

The act of 1816 involves considerations, different from the previous provisions, for the protection of the enlisted common soldier. A class of active, efficient, American citizens, who

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*Lessee of French and Wife v. Spencer et al.*

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had emigrated to Canada, were compelled to leave there on the war of 1812 breaking out; they returned to their own country, and went into its service; and when the war was ended, both officers and soldiers were compensated in land and money for this extraordinary service. The act of Congress orders the warrants to be delivered to the respective owners, to be located by them; whereas the common soldier, provided for in the acts of 1811 and 1812, did not receive his warrant, but the Government bound itself to locate the land at its own expense. Congress may have thought it not at all necessary to guard the Canadian volunteers against being overreached by speculators, and deprived of their bounty lands. This, however, is mere conjecture. The act of March 5, 1816, has no reference to, or necessary connection with, any other bounty-land act; it is plain on its face, and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the Legislature makes a plain provision, without making any exception, the courts can make none. *McIver v. Reagan*, 2 Wheaton, 25; *Patton v. McClure*, *Martin and Yerger's Ten. R.*, 345, and cases cited; *Cocke & Jack v. McGinnis*, *ib.*, 365; *Smith v. Troup*, 20 Johns., 33. We are therefore of the opinion that Fosgit could sell and convey the land to Spencer after the entry was made.

2. The next ground of objection to the deed is, that it conveys no title when fairly construed. It has a double aspect, obviously, for the reason that the parties to it did not know, at the time it was executed, whether or not the land had been located by Fosgit's agent. The issuing of the warrant is recited in the deed, and the quantity of land it calls for; and then the grantor says: "For the consideration of five hundred dollars, I have assigned and set over, and by these presents do grant, bargain, sell, transfer, assign, and set over, to said William H. Spencer, his heirs and assigns, forever, the said three hundred and twenty acres of land; to have and to hold the same in as full and ample a manner as I, the said Silas Fosgit, my heirs or assigns, might or could enjoy the same, by virtue of the said land warrant or otherwise."



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*Lessee of French and Wife v. Spencer et al.*

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Then follows an irrevocable power from Fosgit to Spencer, his heirs or assigns, to locate the warrant, obtain a patent, &c.

The warrant having been located on land already surveyed, it could easily be identified. The description is to the same effect as if the deed had said, I convey the land covered by my warrant of three hundred and twenty acres.

We are therefore of the opinion that the deed was a valid conveyance of Fosgit's interest in the land sued for at the time the deed was executed.

The third exception to the deed is covered by the foregoing answers.

8. The charge of the court to the jury held, as a matter of law, that the deed was a complete defence to the action, and that the patent issued to Fosgit *related back* to the location of the warrant, and constituted part of Spencer's title.

This consideration involves a question of great practical importance to States and Territories where entries exist on which patents have not issued, as sales of such titles are usual and numerous. The incipient state of such titles has not presented any material inconvenience, as it is usually provided by State laws that suits in ejectment may be prosecuted or defended by virtue of the title.

In Indiana, it is provided by statute that "every certificate of purchase at a land office of the United States shall be evidence of legal title to the land therein described." That is to say, for the purposes of alienation and transfer, and for the purposes of litigating rights of property and possession, a certificate of purchase shall be treated as a legal title; and to this effect it is competent evidence in an action of ejectment. *Smith v. Mosier*, 5 Black. R., 51.

After the patent issued, this title was exclusively subject to State regulations, in so far as remedies were provided for its enforcement or protection; and therefore no objection can be made to any State law that does not impugn the title acquired from the United States.

Whether the patent related back in support of Spencer's deed is not a new question in this court. It arose in the case of *Landes v. Brant*, (10 How., 372,) where it was held that a

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*Lessee of French and Wife v. Spencer et al.*

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patent issued in 1845 "to Claymorgan and his heirs," by which the heirs took the legal title, related back and inured to the protection of a title founded on a sheriff's sale of Claymorgan's equitable interest, made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title. The court holding, that when the patent issued, it related to the inception of title, and must be taken, as between the parties to the suit, to bear date with the commencement of title.

It is also the settled doctrine of this court, that an entry in a United States land office on which a patent issues, (no matter how long after the entry is made,) shall relate to the entry, and take date with it. (*Ross v. Barland*, 1 Peters, 655.) The *fiction* of relation is, that an intermediate *bona fide* alienee of the incipient interest may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a court of equity could afford him.

4. We hold that, on another ground, the instruction was clearly proper.

Here, the after-acquired naked fee is set up to defeat Fosgit's deed, made forty years ago in good faith, for a full consideration, and to oust the possession of Spencer's heirs, holding under that deed. The rule has always been, that where there was a warranty or covenants for title, that would cause circuity of action if the vendee was evicted by the vendor, then the deed worked an estoppel. But the rule has been carried further, and is now established, that where the grantor sets forth on the face of his conveyance, by averment or recital, that he is seized of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was seized and possessed at the time he made the conveyance. The estoppel works upon the *estate*, and binds an after-acquired title, as between parties and privies. *Van Rensselaer v. Kearney*, 11 How., 825; *Landes v. Brant*, 10 How., 874.

It follows that the heir of Fosgit is estopped by her father's deed from disturbing the title or possession of Spencer's heirs.

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*Smith v. Orton.*

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It is ordered that the judgment of the Circuit Court be affirmed.

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GEORGE SMITH, APPELLANT, v. JOHN J. ORTON.

After various proceedings in the mode of deeds, bonds, &c., the legal title to a piece of property became vested in one person, and the equitable title in another.

The holder of the equitable title has a right to file a bill against the holder of the legal title, to compel him to convey such legal title upon clearing off the encumbrances.

This right is not destroyed by the circumstance that the holder of the legal title had succeeded in a suit against another holder of the legal title, to which suit the holder of the equitable title was not a party.

The fact that neither party is in actual possession of the premises is of no consequence, because the controversy is with respect to the legal title.

THIS was an appeal from the District Court of the United States for the district of Wisconsin.

It was before this court at a prior term, and is reported in 18 Howard, 268. It is proper to remark that the bill, in this case, set forth that the controversy in the State court, which was referred to in 18 Howard, had become terminated.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Doolittle* for the appellant, upon which side there was also a brief by *Mr. Brown*, and by *Mr. Gillet* for the appellee, upon which side there was also a brief by *Mr. Mariner*.

Mr. Justice CATRON delivered the opinion of the court.

The bill was demurred to, and the demurrer sustained below, and the facts appear only on the face of the bill. Davis held the legal title to the two lots (Nos. 7 and 8) in dispute, lying in or near the city of Milwaukee, in the State of Wisconsin. Davis held the legal title as trustee for Otis Hubbard. In June, 1851, Hubbard, for a good and valuable consideration, conveyed the premises to Joachim Gruenhagin, by a deed in fee, by which the grantee became seized of the entire interest of Hubbard

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*Smith v. Orton.*

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In December, 1852, Gruenhagin, for a good and valid consideration, conveyed the premises to James S. Brown; and in January, 1853, Brown, for a valuable consideration, conveyed to the complainant, Smith. The complainant afterwards also got deeds from Davis and Knab.

Hubbard had sold two other lots in Milwaukee to one Schram, the title to which was outstanding in the names of persons residing beyond the State of Wisconsin. Schram required security for the title from Hubbard.

Butler, a relation of Hubbard, got Knab to give a bond for title, binding himself jointly with Butler, as security to Schram.

To secure himself against loss for his undertaking to Schram, Knab required of Hubbard security to indemnify him, should Hubbard be unable to make a title to the lots sold to Schram; and Hubbard got Davis, who held the legal title to the lots, to convey them to Knab as security, and for no other consideration.

On the same day (22d of July, 1848) that the title bond to Schram was made, Knab executed to Butler a bond covenanting that if Butler would procure the deed from the trustees of Hubbard, and comply with the bond to Schram, he (Knab) would convey the lots to Butler, for which he held Davis's deed; Butler failed to procure the deed, and Hubbard did so himself.

In March, 1851, Butler assigned Knab's bond to Orton, the respondent.

Hubbard never received any consideration whatever for the lots thus transferred; and it is alleged that the bond from Knab to Butler was a secret and fraudulent contrivance on the part of Butler, to cheat Hubbard and obtain his property, and that he was defrauded thereby.

Smith obtained a deed for the lots from Davis, and also one from Knab; but as Davis had no interest, having long previously conveyed to Knab, nothing passed by his deed, unless, as is assumed by the bill, an equity of redemption resulted to Davis.

And, as Orton had filed a bill in a State court against Knab,

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*Smith v. Orton.*

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which was pending when Smith took his deed from Knab, and as Knab was not allowed to disavow his own bond, Orton got a decree against Knab for a conveyance of the legal title, (which conveyance was regularly made,) and therefore the deed from Knab to Smith was of no value. Having been made whilst the suit was pending, it could only have any useful effect on the contingency of Knab's successful defence.

Orton having succeeded, his decree related to the commencement of the suit, and gave him the elder and better legal title, Smith's deed being "subservient to the rights of the parties in litigation." (1 Story's Com. Eq., S. 406.)

Orton has the legal title, beyond dispute. Smith is asserting Hubbard's equity and Davis's right of redemption; and prays by his bill, among other things, "that Orton be decreed to release to him (Smith) all claim or interest in said lots."

Neither party has, or ever had, actual possession of the premises; nor is this of any consequence, as the contest is for the legal title.

Butler certainly had neither a legal nor equitable interest in the property when he sold to Orton. He held Knab's title bond, with full knowledge that Knab held as trustee for Hubbard. And this bond was assigned to Orton, who, according to the allegations of the bill, took it with Hubbard's equity inhering to it.

What effect Orton's decree against Knab may have to protect Orton under the legal title, on a plea of *bona fide* purchaser of an equity, we decline to decide; nor will we discuss the question, as this cause may again come before this court, and involve that question.

The remaining question for consideration is, whether Smith can be heard in a court of equity, being an assignee of an equitable interest in contestation.

Gruenhagin purchased and took a deed for Hubbard's equity, and was clothed with his interest before any litigation was instituted affecting the title. And as neither Gruenhagin, Brown, nor Smith, were parties to the suit of Orton against Knab, the decree against Knab did not in any wise impair the equity obtained from Hubbard, who likewise was no party to

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*Allen et al. v. Newberry.*

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that suit, and who had conveyed to Gruenhagin before it was commenced.

Hubbard's equitable title being distinct from the legal title in controversy between Orton and Knab, no reason existed why it should not be the subject of a *bona fide* sale, and transfer by deed, in like manner that a mortgagor's equity may be sold and conveyed. After a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title. And that is substantially the case the bill makes; for after Hubbard satisfied Schram's bond made for title by Knab and Butler, Knab held the naked legal title, with an undoubted right in Hubbard to call for its surrender. And his assignee stands on the same footing. (4 Kent's Com., 157.) And so the statutes of Wisconsin in effect provide. (Revised Statutes of 1849, ch. 59, sec. 7; ch. 77, secs. 6 and 7.)

We are of the opinion that the court below erred in sustaining the demurrer to the bill, and order the decree to be reversed, and remand the cause, with directions that the District Court proceed in it according to the 34th rule of this court, governing chancery proceedings.

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RUFUS ALLEN AND OTHERS, LIBELLANTS AND APPELLANTS, v.  
HENRY L. NEWBERRY, CLAIMANT OF THE STEAMBOAT FASHION, &C.

The act of Congress passed on the 26th of February, 1845, (5 Stat. at L., 726,) confines the admiralty jurisdiction of the Federal courts upon the lakes to matters of contract and tort arising in, upon, or concerning steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes.

It does not extend, therefore, to a case where there was a shipment of goods from a port in a State to another port in the same State, both being in Wisconsin. And this is so, although the vessel was a general ship, and bound, upon the voyage in question, to Chicago, a port in the State of Illinois. What would be done in a case of general average, the court does not now decide.

THIS was an appeal from the District Court of the United States for the district of Wisconsin, sitting in admiralty.

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*Allen et al. v. Newberry.*

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The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Haven* for the appellants, and by *Mr. Russell* for the appellee.

The question of jurisdiction was not discussed in the argument, and it is not necessary to report the arguments upon the merits.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal in admiralty from a decree of the District Court for the district of Wisconsin.

The libel states that the goods in question were shipped on board the *Fashion* at the port of Two Rivers, in the State of Wisconsin, to be delivered at the port of Milwaukee, in the same State, and that the master, by reason of negligence and the unskilful navigation of the vessel, and of her unseaworthiness, lost them in the course of the voyage.

The respondent sets up, in the answer, the seaworthiness of the vessel, and that the goods were jettisoned in a storm upon the lake.

The evidence taken in the court below was directed principally to these two grounds of defence; but, in the view the court has taken of the case, it will not be important to notice it.

The act of Congress of 26th February, 1845, prescribing and regulating the jurisdiction of the Federal courts in admiralty upon the lakes, and which was held by this court in the case of the *Genesee Chief*, (12 How., 443,) to be valid and binding, confines that jurisdiction to "matters of contract and tort, arising in, upon, or concerning steamboats and other vessels" \* \* \* "employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes, and navigable waters connecting said lakes," &c.

This restriction of the jurisdiction to business carried on between ports and places in different States was doubtless suggested by the limitation in the Constitution of the power in Congress to regulate commerce. The words are: "Congress

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*Allen et al. v. Newberry.*

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shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes." In the case of *Gibbon v. Ogden*, (9 Wh., 194,) it was held, that this power did not extend to the purely internal commerce of a State. Chief Justice Marshall, in delivering the opinion of the court in that case, observed: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between parts of the same State, and which does not extend to or affect other States." Again, he observes: "The genius and character of the whole Government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, when they do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. The completely internal commerce of a State, then, he observes, may be considered as reserved for the State itself." (Ib., 195.)

This distinction in the act of 1845 is noticed by the present Chief Justice in delivering the opinion in the *Genesee Chief*. He observed: "The act of 1845 extends only to such vessels when they are engaged in commerce between the States and Territories. It does not apply to vessels engaged in the domestic commerce of a State."

This restriction of the admiralty jurisdiction was asserted in the case of the *New Jersey Steam Navigation Company v. The Merchants' Bank*, (6 How., 392,) the first case in which the jurisdiction was upheld by this court upon a contract of affreightment.

It was then remarked, that "the exclusive jurisdiction of the court in admiralty cases was conferred on the National Government, as closely connected with the grant of the commercial power. It is a maritime court, instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contract, to those concern-



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*Allen et al. v. Newberry.*

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ing the navigation and trade of the country upon the high seas, &c., with foreign countries and among the several States.

"Contracts growing out of the purely internal commerce of the State, &c., are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the Federal courts."

The contract of shipment in this case was for the transportation of the goods from the port of Two Rivers to the port of Milwaukee, both in the State of Wisconsin; and upon the principles above stated, the objection to the jurisdiction of the court below would be quite clear, were it not for the circumstance that the vessel at the time of this shipment was engaged in a voyage to Chicago, a port in another State. She was a general ship, with an assorted cargo, engaged in a general carrying business between ports of different States; and there is some ground for saying, upon the words of the act of 1845, that the contracts over which the jurisdiction is conferred, are contracts of shipment with a vessel engaged in the business of commerce between the ports of different States. But the court is of opinion that this is not the true construction and import of the act. On the contrary, that the contracts mentioned relate to the goods carried as well as to the vessel, and that the shipment must be made between ports of different States.

This view of the act harmonizes with the limitation of the jurisdiction as expressed, independently of any act of Congress, in the case of *New Jersey Steam Navigation Company v. The Merchant's Bank*, before referred to.

We confine our opinion upon the question of jurisdiction to the case before us, namely, to the suit upon the contract of shipment of goods between ports and places of the same State.

The court is of opinion that the District Court had no jurisdiction over it in admiralty, and that the jurisdiction belonged to the courts of the State.

It may be, that in respect to a vessel like the present, having cargo on board to be carried between ports of the same State, as well as between ports of different States, in cases of sale or bottomry of a cargo for relief of the vessel in distress, of voluntary stranding of the ship, jettison, and the like, where

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*Maguire v. Card.*

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contribution and general average arise, that the Federal courts shall be obliged to deal incidentally with the subject, the question being influenced by the common peril in which all parties in interest are concerned, and to which ship, freight, and cargo, as the case may be, are liable to contribute their share of the loss.

A small part of the goods in question in this case were shipped for the port of Chicago, but are not of sufficient value to warrant an appeal to this court.

The decree of the court below dismissing the libel affirmed.

Mr. Justice WAYNE, Mr. Justice CATRON, and Mr. Justice GRIER, dissented.

Mr. Justice DANIEL concurs in the decree for the dismissal of the libel in this case, but not for the reasons assigned by the court. It being my opinion, as repeatedly declared, that the admiralty jurisdiction, under the Constitution of the United States, is limited to the high seas, and does not extend to the internal waters of the United States, whether extending to different States or comprised within single States. If there be any inefficiency in this view of the admiralty powers of the Government, the fault is chargeable on the Constitution, and on the want of foresight in those who framed that instrument, and it can be legitimately remedied by an amendment of the Constitution only.

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THOMAS MAGUIRE, CLAIMANT OF THE STEAMER GOLIAH, APPELLANT, *v.* STEPHEN CARD, LIBELLANT.

As this court has decided at the present term (see the preceding case of *Allen v. Newberry*) that a contract of affreightment between ports and places within the same State is not the subject of admiralty jurisdiction, so it now decides that a contract for supplies furnished to a vessel engaged in such a trade is subject to the same limitation.

A rule in admiralty, adopted at the present term, takes from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs, which had been assumed upon the authority of a lien given by State laws.

The reason of the rule explains it.

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*Maguire v. Card.*

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THIS case was brought up by appeal from the Circuit Court of the United States for the district of California.

It was a case in admiralty, which arose in this way :

C. K. & William Garrison supplied the steamer *Goliath* with coal, and then assigned the claim to Card. The lien held by the Garrisons was created by the local law of California, (sec. 817, p. 576, Compiled Laws.) The claimant excepted to the libel, on the ground that the libellant was but the assignee of those with whom the contract was made by the master of the vessel, and that he had no lien. The District Court overruled this exception, and gave judgment in favor of the libellant; and this judgment was affirmed by the Circuit Court, on appeal. The vessel was engaged in trade exclusively within the State of California.

It was argued in this court by *Mr. Blair* for the appellant, and *Mr. Doyle* for the appellee.

*Mr. Blair* contended that an assignee had no right to sue under the statute, and that the court below had no jurisdiction, because the assignee had no maritime contract with the ship.

*Mr. Doyle* stated the questions to be—

1. Had Garrison & Co. a lien, or *jus in re*, on the boat?
2. Was that a lien capable of being assigned?

The precise question of jurisdiction, as decided by this court, was not argued by the counsel on either side.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the northern district of California, in admiralty.

The suit was a proceeding *in rem* against the *Goliath*, to recover the balance of an account for coal furnished the steamer while lying at the port of the city of Sacramento, in the months of October and November, 1855. The vessel, according to the averments in the libel, and which are not denied in the record,

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*Maguire v. Card.*

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was engaged in the business of navigation and trade on the Sacramento river, exclusively within the State of California, and, of course, between ports and places of the same State. She was therefore engaged, at the time of the contract in question, in the purely internal commerce of the State, the contract relating exclusively to that commerce, and which does not in any way affect trade or commerce with other States.

The court has held, in the case of *Rufus Allen et. al. v. H. L. Newberry*, at this term, that a contract of affreightment between ports and places within the same State was not the subject of admiralty jurisdiction, as it concerned the purely internal trade of a State, and that the jurisdiction belonged to the courts of the State. That case occurred upon Lake Michigan, within waters upon which the jurisdiction of the court was regulated by the act of Congress of the 26th February, 1845; but the restriction of the jurisdiction by that act was regarded by the court as but declaratory of the law, and that it existed independently of that statute.

The contract in that case, as we have said, was one of affreightment between ports of the same State; but we perceive no well-founded distinction between that and a contract for supplies furnished the vessel engaged in such a trade. They both concern exclusively the internal commerce of the State, and must be governed by the same principles.

There certainly can be no good reason given for extending the jurisdiction of the admiralty over this commerce. From the case of *Gibbon v. Ogden* (9 Wheat., 194,) down to the present time, it has been conceded by this court that, according to the true interpretation of the grant of the commercial power in the Constitution to Congress, it does not extend to or embrace the purely internal commerce of a State; and hence that commerce is necessarily left to the regulation under State authority. To subject it, therefore, to the jurisdiction in admiralty, would be exercising this jurisdiction simply in the enforcement of the municipal laws of the State, as these laws, under the conceded limitation of the commercial power, regulate the subject as completely as Congress does commerce

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*Belcher et al. v. Lawrason.*

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“with foreign nations, and among the several States.” We are speaking of that commerce which is completely internal, and which does not extend to or affect other States, or foreign nations.

We have at this term amended the 12th rule of the admiralty, so as to take from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been assumed upon the authority of a lien given by State laws, it being conceded that no such lien existed according to the admiralty law, thereby correcting an error which had its origin in this court in the case of the *Gen. Smith*, (4 Wheat., 439,) applied and enforced in the case of *Peyroux and others v. Howard & Varion*, (7 Peters, 324,) and afterwards partially corrected in the case of the steamboat *New Orleans v. Phebus*, (11 Peters, 175, 184.) In this last case, the court refused to enforce a lien for the master’s wages, though it had been given by the local laws of the State of Louisiana, the same as in the case of supplies and repairs of the vessel. We have determined to leave all these liens depending upon State laws, and not arising out of the maritime contract, to be enforced by the State courts.

So in respect to the completely internal commerce of the States, which is the subject of regulation by their municipal laws; contracts growing out of it should be left to be dealt with by its own tribunals.

For these reasons, we think the decree of the court below should be reversed, and the cause remitted, with directions to dismiss the libel.

Mr. Justice WAYNE dissented.

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CHARLES BELCHER AND COMPANY, PLAINTIFFS IN ERROR, v.  
GEORGE C. LAWRASON, COLLECTOR OF THE PORT OF NEW  
ORLEANS.

The eighth section of the act of Congress, passed in 1846, (9 Stat. at L., 42,) exacting a penal duty of twenty per cent. when the appraised value of goods imported exceeds the invoiced value by ten per cent., does not include the case of an entry by a manufacturer who has produced the article imported.

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*Belcher et al. v. Lawrason.*

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Nor did previous laws prior to the act of March 3, 1857, (Session Laws, page 199,) justify this penalty. The last-mentioned law puts goods manufactured and goods purchased upon the same footing in this respect.

But by the act of 1842 (Stat. at L.) an addition of fifty per cent. to the duty is laid upon goods imported by a manufacturer, where the appraised value exceeded the invoiced value by ten per cent.

The appraisal of the goods at the customs was properly made under the 17th section of the act of 1842, although imported and entered by the manufacturer.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

It was an action brought by Belcher & Co. to recover back from the collector \$6,159.20, which they alleged to have been exacted as illegal duties, and which they had paid under protest.

The following was the statement of facts in the court below:

1. That the plaintiffs imported into New Orleans, from the island of Cuba, the several cargoes of reboiled molasses, concentrated molasses, sugar-house molasses, cistern bottoms, and cistern sugars, fully set forth in the petition.

2. That said importations were made on entries, from which it appears that the importers were the manufacturers of the goods imported, and not purchasers thereof in the market.

3. That upon the appraisement of the merchandise so imported as aforesaid, the value thereof was fixed by the appraisers at a sum exceeding the invoice value by more than ten per cent., and that no appeal from this appraisement was made by the importers to merchant appraisers.

4. That the defendant thereupon exacted from the plaintiff a penal duty of twenty per centum on the appraised value of the merchandise imported, and that said penal duty, so levied as aforesaid, amounted to the sum of \$6,159.20.

5. That said penal duty was paid under protest, as shown by the protests filed, which are made part of this statement of facts.

Upon this statement of facts, the Circuit Court decided that the said merchandise was not legally subject to a penal duty of twenty per cent. on the appraised value aforesaid, but was legally subject to a penal duty of fifty per cent. on the amount of

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*Belcher et al. v. Lawason.*

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duties which would have been properly chargeable if the invoice had expressed the true value of the merchandise imported, and the excess of penal duty so charged as aforesaid being ascertained to amount to \$1,589.80, which ought to be returned to plaintiffs.

The plaintiffs brought the case up to this court.

It was argued by *Mr. Benjamin* and *Mr. Johnson* for the plaintiffs in error, and by *Mr. Hull* and *Mr. Black* (Attorney General) for the defendants.

One of the questions raised in the Circuit Court was abandoned by the counsel here. They conceded that the report of the official appraisers could only be corrected by an appeal to merchant appraisers. The question was settled in *Bartlett v. Kane*, (16 How., 263,) reported subsequently to the bringing of the action.

Upon the first of the remaining two propositions they contended that the exaction of the penal duty of twenty per cent. on the invoice value of the importations, under the eighth section of the tariff act of 1846, was clearly illegal, that point being settled by this court in the case of *Greely v. Thompson*, (10 How., 226,) also ruled by the New York Circuit Court, in *Christ v. Spear*, *Thompson v. Maxwell*, *Durand et al. v. Lawrence*.

Upon the other proposition, the arguments of the counsel on both sides were founded upon critical examinations of the tariff laws, which would not be interesting after the historical inquiry into these acts contained in the opinion of the court.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the eastern district of Louisiana.

The suit was brought in the court below to recover back from the collector of the port of New Orleans an excess of duties paid by the plaintiffs. The goods upon which the duties were imposed were certain invoices of molasses and sugars, imported from Matanzas, in the island of Cuba, in the year

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*Belcher et al. v. Laurason.*

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1852. They were imported by the manufacturer, and, on an appraisal of the value at the customs in New Orleans, the appraised value exceeded the invoice value upwards of ten per centum; whereupon, the collector imposed an additional duty of twenty per centum upon the appraised value, under the 8th section of the act of 1846, which was paid under protest.

The court below held that this additional duty was improperly imposed, under the act of 30th July, 1846, as the 8th section of that act applied only to merchandise *purchased* in the foreign market, and did not embrace goods imported by the manufacturer. The court further held, that the several shipments were subject to the increased duty imposed under the 17th section of the act of August 30, 1842; and allowed the plaintiff to recover the excess over and beyond the amount chargeable under this last section.

The principal question in the case is, whether or not the 17th section of the act of 1842 applies in the appraisal of merchandise imported by the manufacturer.

The act of Congress of March 1, 1823, recognised a distinction between goods imported which were purchased by the owner in the foreign market, and goods imported by the manufacturer himself, and prescribed separate and distinct oaths to be taken before the collector, (sec. 4.) That act also prescribed, as a rule for the appraisal of the goods, that to the actual cost if the same shall have been actually purchased, or the actual value if the same shall have been procured otherwise than by purchase, *at the time and place when and where purchased, or otherwise procured, &c.*, shall be added all charges, &c., (sec. 5.)

The act of Congress of July 14, 1832, preserved the same distinction as in the act of 1823, in respect to goods imported which had been purchased, and goods procured otherwise than by purchase, (sec. 15, secs. 7 and 8.)

The 16th section of the act of 1842, like the 7th section of the act of 1832, prescribed the rule for the appraisal of goods imported which had been purchased in the foreign market, but omitted any provision in respect to goods imported which had been procured otherwise than by purchase, leaving this class



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*Belcher et al. v. Lawason.*

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of importations to the rule as prescribed in the acts of 1823, section 5, and 1832, section 15, which was not repealed, as no provision in that act was inconsistent with this rule. The repealing clause of that act is as follows: "And that all provisions of any former law inconsistent with this act shall be, and the same are hereby, repealed." The regulations, therefore, of the acts of 1823 and 1832, in respect to the time and place when and where goods, procured otherwise than by purchase, were left untouched by the 16th section of the act of 1842.

Then, as it regards the 17th section. That is general, and applies to every class of importations—goods purchased, or procured otherwise than by purchase. It regulates the mode and manner of the appraisement. The appraisers may call before them, and examine upon oath, the owner, importer, consignee, or any other person, touching any matter deemed material in ascertaining the true market value or wholesale price of any merchandise imported; may call for letters, accounts, or invoices, relating to the valuation. It imposes a forfeiture of one hundred dollars for any neglect or refusal to attend before the appraisers and give evidence; makes false swearing before them perjury; and if the person be the owner, importer, or consignee, forfeits also the merchandise; requires that the evidence thus taken shall be filed in the collector's office, for future use; provides for an appeal, on the part of the owner, importer, or consignee, to merchant appraisers, in case of dissatisfaction at the appraisal by the permanent appraisers; makes the appraisal by the permanent or merchant appraisers, as the case may be, final and conclusive; and then closes with a proviso, that, in all cases where the actual value thus appraised and ascertained shall exceed, by ten per centum, the invoice value, then, in addition to the duty imposed by law, there shall be levied and collected on the goods fifty per centum of the duty upon the appraised value. (See, also, act of Congress, March 8, 1851.)

As we have said, this section applies to all classes of importations, and regulates the mode and manner by which the appraisals shall be conducted by the appraisers, giving to the owner, importer, &c., the right of reappraisal by merchant ap-

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*Belcher et al. v. Lasorason.*

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praisers, in case of dissatisfaction. It embraces not only importations of goods purchased, referred to in the 16th section of the act, but importations procured otherwise than by purchase, as provided for in the acts of 1823 and 1832; and while this act of 1842 remained in full force, it subjected all importations to the penalty of fifty per centum in case of undervaluation.

Then came the act of 30th July, 1846, the 8th section of which changed this penalty or increased duty, in case of undervaluation, to twenty per centum on the appraised value, as it respected goods imported which had been purchased, leaving the regulations in respect to goods imported by the manufacturers as they existed under the former laws.

This act, like the act of 1842, repealed only such enactments of former laws as were repugnant to its provisions, (sec. 11.) The 8th section, not including the manufacturer, left the importation subject to the 17th section of the act of 1842.

The act of 3d March, 1857, obliterates this distinction between goods purchased or procured otherwise than by purchase, and imposes upon the latter the twenty per centum upon the appraised value, for undervaluation, the same as in case of goods purchased. (Sess. Laws 1857, p. 199, Lit. & Bro. ed.)

It has been argued that, admitting the goods were properly subject to the fifty per centum increased duty, under the 17th section of the act of 1842, inasmuch as this was not imposed by the collector, but the higher increased duty, under the 8th section of the act of 1846, the court below erred in charging the shipments in question with the former duty.

But the answer to this objection is, that the law imposes the increased duty in case of undervaluation, and not the collector. It is true he is the agent of the Government to collect it, as he is in collecting the ordinary rate of duties, but in no other sense or character. The law declares, in the case contemplated by the act, and which existed upon the proofs before the court, that, in addition to the ordinary duty, there shall be levied and collected, &c., fifty per centum, &c. No demand of the collector was necessary to create the liability. That

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*Pemberton v. Lockett et al.*

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arose, as matter of law, upon the facts disclosed in the record, and it was the duty of the court to enforce it; and hence the excess over this increased duty, arising under the 17th section, constituted the just amount which the plaintiffs were entitled to recover.

Judgment of the court below affirmed.

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JOHN PEMBERTON, LIQUIDATOR OF THE MERCHANTS' INSURANCE COMPANY, APPELLANT, v. EDWARD LOCKETT, JAMES G. BRETT, AND HENRY D. JOHNSON.

An agreement between a claimant and certain persons in Washington, whereby the claimant agreed to allow those persons a proportion of what might be recovered, was terminated when the United States and Great Britain made a convention, providing for the appointment of a board of commissioners to decide upon claims, in which the one in question was included.

The agreement looked only to the services in Washington of the persons employed; and the facts of the case indicate that such was the intention of the parties.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

The facts are stated in the opinion of the court.

The Circuit Court decreed that \$14,230, (being the one-half of the sum of \$28,460 awarded,) less five per cent., together with interest thereon from the 20th of June, 1855, and costs, be paid by Pemberton to the complainants. From this decree, Pemberton appealed to this court.

It was argued by *Mr. Brent* and *Mr. Johnson*, with whom was *Mr. May*, for the appellant, and by *Mr. Bradley* for the appellees, on which side there was also a brief filed by *Mr. Bradley* and *Mr. Hayes*.

There were many points raised by the counsel for the appellant; but as several of them were not touched upon in the decision of the court, it is proper to mention only such as were. The principal points which were included in the decision related to the facts of the case, and were as follows:

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*Pemberton v. Lockett et al.*

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Pemberton resided in New Orleans; Berret, Johnson, and Lockett, resided in Washington city; and the agreement was made in New Orleans.

This Creole claim was presented to the Executive Government of the United States, and was considered by it, (See Opinion of Attorney General Legare of July 20, 1842, 4 vol., 98,) was discussed in Congress, and became the subject of negotiation between our Government and that of Great Britain.

At length a convention, on the 8th of February, 1853, was made between these Governments, for the adjustment of all claims of the citizens of either Government against the other, and commissioners were appointed for hearing and deciding upon said claim.

10 Stat. at Large, 988.

These commissioners sat in London, and a public officer, called the law agent of the United States, was duly commissioned under the convention, to represent all claims of our citizens before the board; and he was present in London, and performed his duties, and was paid for them by the Government of the United States.

Neither of the defendants in error appeared before the board or the umpire appointed under the convention.

Before that board the "Creole case" was presented, and "it was considered and discussed *as a single case*, and not in the name of a particular claimant."

The questions of fact and law were common to all who were interested in this claim.

There was *no other* argument presented to the commission in the "Creole case," except that which was made *verbally* by the said law agent of the United States.

The papers in the claim were transmitted to London by the State Department.

Trinder & Eyre, of London, solicitors, were employed by Pemberton, under the advice of Senator Benjamin, to represent his claim before the board, so far as it was competent for private counsel to do so. And they presented to the law agent of the United States a memorial in his behalf, and properly-authenticated evidence in support of the claim,

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*Pemberton v. Lockett et al.*

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and "which went before the commissioners when the papers were placed in their hands."

Without authentic data to establish the loss of each claimant, no specific amounts could have been awarded.

That another memorial and proof to sustain it was forwarded by Johnson, one of the defendants in error, to the said law agent at London, and was presented by him and used in support of Pemberton's claim.

That said Johnson claimed to be counsel for others, and among them for said Lockett, one of the defendants in error, before said board in the "Creole case," and forwarded a memorial in his case.

That by the 8d article of said convention all claims were to be presented within six months from the day of the first meeting of the board.

10 Stat. at L., p. 988, art. 1; 990, art. 8.

That said Johnson did not transmit the memorial prepared by him for Pemberton's claim until after 29th of May, 1854, and after the lapse of six months from the opening of the board.

That so carelessly was the same prepared, that he did not even correctly present the *name* of said Pemberton, nor did he forward it for forty-two days after he swore to it, as shown by his letter of the 29th day of May, enclosing it; and this, though the memorial, as sworn to, shows on its face that it was then out of season, and liable to be ruled out.

That neither the said Berret nor Lockett appear to have had any agency or part whatever in representing or prosecuting the said claim.

That besides the said memorial and papers transmitted by said Johnson to said law agent, the only part he had or took in representing the said claim of Pemberton was a mere reference to the same by a letter to the said board, stating that his argument, presented in said Lockett's case, "was applicable to the case of the Merchants' Insurance Company."

That said Lockett's claim was a heavy one, being for the value of seventy-five slaves, and it comprised all the labor and service rendered by said Johnson in the "Creole case;" and that the same was submitted on said Johnson's argument,

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*Pemberton v. Lockett et al.*

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made in that behalf alone, so far as he was concerned, and without other act or thing done by him in behalf of Pemberton, other than the reference aforesaid.

That the said Lockett, Berret, and Johnson, before the case was argued in London, released and abandoned their said joint contract for their services to said Pemberton; and the said Johnson, who *alone* afterwards appeared or was known in the case, was a mere volunteer, and offered to make a new contract for his services, to be rendered for one-half the amount stipulated for in the said joint agreement.

That said Trinder & Eyre were present at the argument of the claim, and aided the law agent of the United States in the case, and their correspondence will show an actual and faithful performance of duty. And they were compensated by Pemberton.

That the award in the "Creole case" was made on the 9th of January, 1855, by the umpire, Mr. Bates; and two several items of claim were allowed said Pemberton, amounting to \$28,460, on the 15th of January, 1855.

And this sum was transmitted to the Department of State at Washington, and received by the Secretary of said Department, as the money of the said Pemberton, as liquidator, and to be paid to him as such, subject to a deduction of five per cent. for the expenses of the commission.

That the full amount due and payable to said Pemberton was by him claimed at the State Department, from the then Secretary thereof, the Hon. William L. Marcy, and the payment of one-half thereof was refused and restrained by injunction issued from said Circuit Court on the 20th of June, 1855, "commanding said Pemberton, his attorneys, agents, &c., not to demand or receive the remaining half of said award to him as liquidator, to wit: the sum of \$14,230, subject to said deduction of five per cent." And the said sum of money has remained and now is in the said Department of State, under the said injunction, which has *never been dissolved*.

The counsel for the appellees contended, amongst other points, that the contract had neither been rescinded by the acts of the parties nor the change of circumstances.

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*Pemberton v. Lockett et al.*

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Upon the latter proposition, their argument was as follows :

2. The contract was not rescinded or annulled by any change of circumstances rendering it impossible to be carried into effect.

The appellees deny the allegation in the answer, that compensation was agreed upon in the event of a recovery of the claim against the United States. No such condition is expressed or implied in the contract. The appellees also deny the allegations in the answer, that the contract was entered into for services to be performed in Washington city, and that the provision in the convention, "that it shall be competent for each Government to name one person to attend the commissioners, as *agent on its behalf*, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof, were circumstances of themselves which put an end to the contract, so that complainants had no longer any right to recover thereon." No such conditions are found in the agreement.

The most important work in the prosecution of the case (viz: the preparation of evidence) could only be done in the United States, and particularly in the city of Washington. The evidence shows that the appellees were employed several weeks in obtaining testimony from the Departments in Washington. The convention provided that the claims should be heard upon such evidence or information as shall be furnished by or on behalf of their respective Governments. (Report of Decisions of the Commission of Claims, p. 9.) Thus, all the memorials and proofs were required to be presented through the Department of State at Washington.

The appointment of an agent in behalf of the United States did not dispense with the necessity for employing associate counsel. Such counsel were frequently associated with the agent of the United States. (Report of Decisions of the Commission, pp. 16, 18, 29, 41, &c.)

There was no necessity for employing English counsel, as is alleged, as the case was not before an English court, but a joint commission; and, from the peculiarity of the case, English counsel were totally unfitted to manage it.

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*Pemberton v. Lockett et al.*

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Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the District of Columbia.

The bill was filed in the court below, by the respondents, against the appellant, Pemberton, liquidator of the Merchants' Insurance Company, in the city of New Orleans, representing the interest of that company, which was insolvent, for the purpose of establishing a title to certain moneys in the possession of the Government, which had been received under the convention between the United States and Great Britain, of the 8th of February, 1858. The money had been awarded by the umpire, under that convention, to the company, which had been subrogated to the rights of one of the claimants for compensation against Great Britain, in the case of the brig *Creole*. The umpire allowed to the company \$28,460. The complainants below set up, in their bill, a title to one-half of this fund, as the agents and attorneys of Pemberton in the prosecution of the claim.

The right rests upon the following agreement, entered into between them and the defendant (Pemberton) at New Orleans, dated the 28d of December, 1851 :

"For and in consideration of services rendered, and to be rendered, by James G. Berret, Henry D. Johnson, and E. Lockett, of Washington city, D. C., in the prosecution of our claims for the value of slaves freed at Nassau, N. P., which we had to pay for, we do hereby agree to allow to said Berret, Johnson, and Lockett, their heirs or assigns, one-half of any or all such sums of money, principal and interest, as may be recovered on account of our said losses, it being understood that the said Berret, Johnson, and Lockett, are to use their best exertions in the prosecution of said claim, and that no allowance whatever, as expenses or compensation for their services, is to be made by us to the said Berret, Johnson, and Lockett, unless our said claim shall be allowed, in whole or in part. Witness our hand and seal, at New Orleans, this 28d day of December, in the year of our Lord 1851."

The claims referred to in this agreement originated as far back as the year 1841, in consequence of the unwarrantable



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*Pemberton v. Lockett et al.*

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interference of the public authorities at Nassau, in the island of New Providence, one of the Bahama Islands, belonging to Great Britain, and liberating a cargo of slaves, who were on a voyage from Virginia to New Orleans, and who had mutinied, overcome the officers, and carried the vessel into that port.

The persons interested in the slaves, of which they were deprived by this interference, immediately appealed to their own Government for redress. A correspondence was opened between this Government and Great Britain on the subject, which continued down to the time of the convention already mentioned, of the 8th of February, 1858.

This convention provided for the appointment of a board of commissioners, one to be named by each Government, and the two to appoint an umpire, to decide upon all claims in which a difference of opinion should occur.

The board sat in the city of London, and were bound, according to the terms of the convention, to receive and peruse all written documents or statements which might be presented to them, by or on behalf of their respective Governments, in support of or in answer to any claim; and to hear, if required, one person on each side, in behalf of each Government, as counsel or agent for such Government, on each separate claim. Each Government appointed an agent to represent it before the board; and, as we have said, the umpire allowed to the insurance company \$28,460.

It is insisted, on behalf of the defendant, (Pemberton,) that this contract, entered into with complainants in 1851, had reference to the solicitation of claims before, and allowance by, the Government, at the city of Washington; that they were employed as gentlemen residing at that place, engaged in business of this character; and that the convention between the two Governments, the appointment of a board of commissioners, and prosecution of the claims against Great Britain before it, under the authority of the United States, put an end to the contract. Although its terms are general, and open to some difficulty as to the real meaning and intent of the parties, we are inclined to concur in this view of it. We

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*Pemberton v. Lockett et al.*

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think it could hardly have been within the contemplation of either of the parties, that the prosecution spoken of in the argument was a prosecution or solicitation of claims against the foreign Government, or in a tribunal sitting there, and before which this Government had taken upon itself the duty of the prosecution. We are satisfied these agents were under no obligation, according to the true intent of the agreement, to follow these claims to London, and prosecute them there; and if not, it is quite clear the transfer of them to the commission there put an end to the agreement. And this seems to have been the view taken of it by the parties themselves, as manifested by their conduct after the appointment of the commission.

By the third article of the convention, the claims were to be presented before the board within six months from the day of its first sitting, unless a good reason could be given for the delay. The board first met in London on the 15th of September, 1853; and on the 15th of October it adopted rules and regulations in respect to the proceedings before it, and, among others, required all claims to be presented within six months from the 15th of September, the day of its first sitting.

Now, the first step taken by these complainants in behalf of the claims of Pemberton, under the convention, was a letter written to him by Lockett, dated December 15, requesting that a power of attorney should be given to Johnson, to act for him before the commission. This was three months after the commencement of its sittings, and after half the period had expired within which the claims were required to be presented. It does not appear that this letter was answered by Pemberton.

The next step taken was a letter from Johnson himself, dated at Washington, 22d of March, 1854, in which he announces that he had prepared a memorial on behalf of the claims of the insurance company, and was ready to forward it to the commissioners, in London. This was seven days after the expiration of the six months.

In the mean time, Pemberton had employed agents residing in London to attend to his claims, and who, it appears, had the charge and management of the business until the close of the commission.

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*Pemberton v. Lockett et al.*

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What is very material, also, in this letter of Johnson of the 22d of March, he there states, in respect to the situation of his two associates, as an inducement to Pemberton to give him, individually, the power of attorney—that Lockett is absent, and that Berret was unable to attend to the business, having been appointed postmaster of the city; and then proposes to conduct the business himself alone, for the compensation of twenty-five per centum of the money recovered, the half only of what is now claimed under the agreement of 1851. It does not appear that any answer was returned to this letter, doubtless for the reason that other agents had already been employed.

It is true, that Johnson drew up the memorial to the commissioners, on behalf of Pemberton, as above mentioned, but without any authority from him, and swore to it, at Washington, on the 17th of April, 1854, in which he endeavored to explain the delay in presenting the claim; and forwarded the same from this country on the 29th of May following. But the subject had already been brought to the notice of the Government agent, and before the board of commissioners, as early as the 23d of that month, by the agents of Pemberton in London. This memorial, therefore, was of no particular importance.

It appears from the report of the proceedings under the commission, and of its decisions, communicated to Congress by the President, 11th of August, 1856, (Senate Docs., vol. 15, 1855-'6,) that there were six separate claimants, besides Pemberton, for compensation arising out of the case of the *Creole*, and all depending, substantially, upon the same facts. And there were, also, the cases of the brig *Enterprise* and schooner *Hermosa*, involving principles similar to those upon which the reclamation depended in the case of the *Creole*. All the parties whose claims arise out of the case of the *Creole* were equally interested in furnishing the proofs upon which the general claim against the British Government rested; and the three vessels were interested in common, as to the principles of international law that should govern the decision of the board of commissioners.

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*Poorman et al. v. Woodward et al.*

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The Government agent and commissioners took this view of these several claims, and but one argument was made in all of them, and that in the case of the brig *Enterprise*, and but one opinion delivered by the commissioners. As they disagreed, a second argument was made before the umpire.

The preparation of the claim of Pemberton, beyond the proofs of the interest of his company in the case of the *Creole*, was a very trifling matter; and even these proofs had been already furnished to this Government, at the time the appeal was made there for redress. And as it respects the questions of international law involved in these cases, they had been the subject of repeated discussion between this Government and Great Britain, and also in Congress, by some of the most distinguished statesmen and jurists of the country; and the preparation for the argument of the claim before the board of commissioners required little else than the labor of digesting and reproducing the principles and reasoning to be found in these discussions.

For the reasons above given, we are satisfied the agreement and proofs in the case furnish no legal or just ground for a claim to the sum of money awarded by the court below, and that the decree should be reversed, and the proceedings remitted, with directions to enter a decree dismissing the bill.

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DANIEL POORMAN AND OTHERS v. WILLIAM A. WOODWARD AND  
WILLIAM C. DUSENBERRY, LATE PARTNERS UNDER THE FIRM  
OF WOODWARD & DUSENBERRY.

Where certain persons gave a joint and several note for the purpose of raising money, and their agent received a certificate of deposit, which certificate was afterwards duly paid upon presentation, the signers of the note cannot escape from their responsibility upon the plea that a certificate of deposit was not money.

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of Ohio.

The facts are stated in the opinion of the court.

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*Poorman et al. v. Woodward et al.*

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It was argued by *Mr. Stanbery* for the plaintiffs in error, and by *Mr. Marbury* for the defendants, upon which side there was also a brief filed by *Mr. Smythe*, which was adopted by *Mr. Swayne*.

*Mr. Stanbery* contended that a certificate of deposit is in no sense cash, or money; it is simply an acknowledgment of a debt, with a promise of payment. The transaction between Hood and Woodward & Dusenberry was simply the exchange of one form of negotiable security for another.

This was clearly a breach of trust, and a perversion of the authority to use the note for the loan of money.

He referred to the following cases:

*Thorold v. Smith*, 11 Modern, 71, 87.

*Bartlett v. Pintland*, 10 Barn. and Cress., 758.

*Atkins v. Owen*, 4 Ad. and Ellis, 819.

*Nightingale v. Devisone*, 5 Burr., 2589.

*Mr. Marbury* made the following points:

1. This was an action of assumpsit, in which the plaintiffs below, the defendants in error, Woodward & Dusenberry, recovered of the defendants below, the plaintiffs in error, Poorman et al., the sum of \$4,473.76, being amount of the cash balance of \$2,997.67 due to the defendants in error, with interest thereon from December, 1849, to the date of the judgment, with costs.

2. The whole amount originally loaned and advanced to Poorman et al. was the sum of \$6,000. This loan was made on the joint and several note of Poorman et al. for \$15,000, dated Somerset, Ohio, October 24th, 1849, and payable to the order of Woodward & Dusenberry, thirty days after date.

3. With this note in his hands, Thomas Hood, one of the joint makers thereof, applied to W. & D., in the city of New York, for a loan of \$6,000, and requested them to deliver to him their certificate of deposit of that amount, to the credit of John Ritchey, Esq., cashier.

4. Thereupon the note was delivered to W. & D., and on the faith thereof the certificate of deposit was delivered to

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*Poorman et al. v. Woodward et al.*

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Hood. Ritchey, the payee, duly endorsed the certificate; and when it was presented, subsequently, by the *bona fide* holders thereof, to Woodward & Dusenberry, they paid the full amount thereof in cash, according to its tenor and obligation.

5. The certificate of deposit, so granted, was in effect, as the court below correctly instructed the jury, money, and came within the authority to borrow money—an authority which Hood had expressly received from the other makers, and which, moreover, he possessed independently as one of the joint makers of the note.

6. No restriction or limitation was placed on Hood's power as to the amount of the loan, nor as to the mode, or form, or kind of funds, in which it was to be effected. He had a general authority as joint maker and holder to borrow or raise money on the note, in any way not illegal, for the benefit of himself and his associates.

7. The transaction was just the same in legal contemplation and in substance as if he had received the \$6,000 in specie or bank bills, or the check of Woodward & Dusenberry, and then deposited the amount with them, and taken their certificate of such deposit.

8. The certificate was of the deposit of so much money, and in fact it yielded in money, on presentation, the full sum of \$6,000, expressed on its face.

9. The makers of the note lived in Ohio, where they wanted to use their funds; and for their convenience and accommodation this negotiable certificate of deposit of cash, answering their purpose as cash, was granted.

10. The class of cases relied on by the plaintiffs in error, such as *Bartlett v. Pintland*, (10 Barn. and Cres., 758; *Atkins v. Owen*, 4 Ad. and Ellis,) merely hold that a naked agent, authorized to receive payment, cannot do so by discharging a debt due from himself to the party by whom the payment should be made. (See observations upon those cases—*Dunlap's Paley's Agency*, 284.)

This court has held, in a more analogous case, (*Taylor v. Merchants' Fire Ins. Co.*, 9 How., 402,) that where the mode of payment is not prescribed, the agent may exercise a discretion

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*Peorman et al. v. Woodward et al.*

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11. The judgment should be affirmed, with costs.

The brief adopted by *Mr. Swayne* contained the following more extended notice of the authorities cited by *Mr. Stanbery*, and also of some American authorities:

It will not do to narrow the question to the simple proposition stated in *Mr. Stanbery's* brief, viz: whether the certificate is money. It is not necessary to affirm this, to show the transaction binding on all the parties, and the remedy within the count, for money had and received. Hood, having authority to borrow money on this note, had authority to receive anything which, in the usual course of business, is treated as such, and will command it. If he got the money or its equivalent, the object of himself and his principals was attained; and it does not lie in their mouths, after having acquiesced in what was done, and realized the money on the certificate, to dispute their liability, because the money, in form, was not given to Hood at the precise time that he parted with the note.

With all due respect for the learned counsel and his ancient authorities, we submit, that they do not meet this case. *Thorold v. Smith* was the case of a servant sent to collect a debt due his master, and he received a goldsmith's note and gave a discharge. The note was not paid, the maker becoming insolvent. The question was, "whether this was good payment to the plaintiff, and was held to turn on the authority conferred on the servant. And it was agreed by the court that this was a matter of evidence to the jury, and that the authority in the servant was to be presumed, if the master did not promptly return the note, and that he "was acquainted with and acquiesced in what had been done." And *C. J. Holt* said that "any jury at Guildhall would find payment, by a bill, to be a good payment, it being a common practice of the city."

In *Bartlett v. Pintland*, the broker, employed to secure a loss on an insurance policy, set off his own debt to the underwriters, and became bankrupt. This was held not to discharge the liability.

In *Atkins v. Owens*, the defendant was employed simply to

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*Poorman et al. v. Woodward et al.*

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procure an endorsement of a time bill of exchange by a party from whom the plaintiff had received it, and he, the defendant, converted the bill to his own use, without receiving any money upon it. It was held that, though liable in trover, assumpsit for money had and received would not lie.

In *Nightingale v. Devisione*, the defendant had received from Mittvier, who was a bankrupt, the transfer of five hundred pounds East India stock. The plaintiffs, assignees of the bankrupt, brought suit for money had and received. Lord Mansfield said this was a new species of property, and was not money to be recovered in that form of action.

As to the first case cited, can there be a doubt that, even in that age, if the servant or the master had, in fact, received the money on the goldsmith's note, that the plaintiff in that case would have been estopped? So, in the last case cited, if the defendant had converted the stock into money, is there any question that the action for money had and received would lie? The other two cases do not seem to be at all analogous.

It will be observed that in England, especially in the earlier cases, there was a strong disposition to limit the evidence, under the money counts, to strict money transactions. Lord Holt strenuously resisted the then growing practice in trade of treating bankers' cash notes and promissory notes as negotiable, until they were made so by the statute of Anne. But the American authorities have liberalized the doctrine in this respect, to meet the expanded customs of commercial transactions, and have held those money securities which in the common course of business are treated as money, and even bills of exchange and promissory notes, proper evidence under the money counts. They have even gone farther, and sustained this action in cases where there was no negotiable money security received by the defendant, but where, in the nature of the transaction, he ought, in equity, to respond for money received.

Thus, in *State Bank v. Hurd*, (12 Mass., 172,) an endorsee of a negotiable note recovered against the endorser. The action was also sustained in behalf of the endorsee against the maker



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*Poorman et al. v. Woodward et al.*

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(*Ramsdell v. Soule*, 12 Pick., 126.) And, even where the maker signed the note for the accommodation of the payee. (*Cole v. Cushing*, 8 Pick., 48.) So also in behalf of the holder of a note payable to bearer.

*Grant v. Vaughan*, 3 Burr., 1516.

*Pierce v. Crafts*, 12 J. R., 90.

*Olcott v. Rathbone*, 5 Wend., 490.

So it has been held that if a draft, not negotiable, be accepted by the drawee, with an agreement to pay the amount to any person to whom it is assigned, the assignee, after notice, may maintain the action for money had and received against the acceptor.

*Weston v. Penniman*, Mason, 306.

In *Tuttle v. Mayo*, (7 J. R., 182,) it was held that the taking of negotiable paper is equivalent to the receipt of money, so as to maintain this action.

So in *Floyd v. Day*, (3 Mass., 408.) If an agent compromise a demand of his principal, by receiving from the debtor a negotiable note, endorsed specially to the agent, the principal may recover of the agent the amount of the liquidated damages, in an action for money had and received.

The taking of a promissory note as payment of an execution, and endorsing it satisfied, was held equivalent to the payment of money, and that the amount of such note may be regarded as money.

*Clark v. Pinney*, 6 Cow., 297.

In *Bank of Kentucky v. Wister et al.*, (2 Pet., 325,) where depreciated bank bills, passing in community at one-half their value, were deposited with the bank, and a certificate taken, this was held to be equivalent to money.

If a creditor receive of his debtor a demand against a third person, payable in money, as a pledge or collateral security for the debt, and the creditor receive payment of the demand in money or otherwise, and appropriate the proceeds to his own use, and there be more than sufficient to pay the debt, the debtor may recover the surplus, in an action for money had and received.

*Randall v. Rich*, 11 Mass., 494.

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*Peorman et al. v. Woodward et al.*

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**Emerson v. Cutts, 12 Mass., 78.**

If two be jointly concerned in merchandise, to be sold for profit, and one takes and appropriates it to his own use, he is liable to the other for his proportion of the net profits, in this form of action.

**Stiles v. Campbell, 11 Mass., 321.**

Where an attorney or agent has discharged a debt due to his principal, and applied the amount to the payment which the attorney owed to his principal's debtor, the amount of the debt so discharged may be recovered in this form of action. So, where an attorney, on a judgment in favor of his client, purchased lands under the execution, and paid by discharging the judgment, this action will lie.

**Beardsley v. Root, 11 J. R., 464.**

Property paid or used as money will support the action for money had and received, the same as if money itself had been paid and received.

**Ainslee v. Wilson, 7 Cow., 662.**

In *Picard v. Banks*, (13 East., 20,) a stakeholder, who had received banker's cash notes, and had wrongfully paid them over to the losing party, was held liable to the winner in an action for money had and received; and this, upon the ground that, though the notes were not money, yet being received as such, and so treated, he should not say they were only paper, and not money.

And in *Owenson v. Morse*, (7 T. R., 64,) it is said of such notes, that, "on account of their being payable on demand, they are considered as cash; but, if presented in due time and dishonored, they will not amount to payment," unless the defendant had agreed to take them as payment.

A certificate of deposit is like a check on a banker, of which it is said, (*Chitty on Bills*, 323,) "in practice they are taken as cash, and it has been decided that a banker in London, receiving bills from his correspondent in the country, to whom they had been endorsed to present for payment, is not guilty of negligence in giving up such bills to the acceptor, upon receiving a check on a banker for the amount, although it turn out that such check is dishonored."

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*Peorman et al. v. Woodward et al.*

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**Russell v. Hankey, 6 T. R., 12.**

If the agency of a stranger, for receiving payment for his principal, will thus authorize the receipt of such securities as money, why may not an agent, having a common interest with his principals, do the same thing?

In construing the authority conferred on Hood by the plaintiffs in error, we must look to the circumstances of the parties, their place of residence, their relations to the subject of the agency and to each other, their common interest in the transaction; and if Hood did what it may reasonably be supposed the others would have done, had they been present, it cannot be said that he exceeded his authority. And, especially, if, after it was done, they acquiesced by their silence, and availed themselves of the benefits of the transaction, they must be presumed to have authorized it. If Hood treated the certificate as money, so did they; and shall they now be permitted to say that they will not be bound by their agreement to receive it as money?

In passing upon the transactions of men, the law treats the subject-matter according to the usual understanding and usages prevailing where the transaction took place. In this view, the certificate of deposit is money. It is so treated and dealt with in the common business of life.

Mr. Justice CATRON delivered the opinion of the court.

Hood and nine others, including the defendants, made a note of hand in Ohio, dated October 24th, 1849, for fifteen thousand dollars, payable to Woodward & Dusenberry thirty days after date, at their office in New York.

For himself, and as the agent of the other makers, Hood applied to the payees, Woodward & Dusenberry, for an advance of money on the note, for the benefit of all the makers jointly. Woodward & Dusenberry agreed with Hood to advance, on a pledge of the note, as security, six thousand dollars; and Hood requested them to give to him their certificate of deposit for that sum, to the credit of John Ritchey, cashier; which was done, and Ritchey, as payee, endorsed the paper to Hood. It was subsequently presented for payment by *bona fide* holders, and

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*Poorman et al. v. Woodward et al.*

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Woodward & Dusenberry paid the full amount thereof in cash.

At the time the certificate of deposit was given, and endorsed by Ritchey, and the fifteen thousand dollar note delivered to Woodward & Dusenberry, they agreed with Hood that if he should return to them the certificate of deposit, they would then surrender to him the note. The money advanced not having been refunded, except in part, this suit was brought in assumpsit to recover the balance.

In their answer to a bill of discovery, Woodward & Dusenberry admit they were advised by Hood that the \$15,000 note "had been executed by himself and his friends, the other signers thereof, for the purpose of borrowing money thereon for the joint benefit of all of them;" also, "that at the time said note was delivered to the said Woodward & Dusenberry, they issued and delivered to said Hood, for the joint use and benefit of all the parties signing said note, as the respondent understood it, the certificate of deposit of said Woodward & Dusenberry for the sum of six thousand dollars, by request of said Hood, made payable to the order of John Ritchey, Esq., cashier at the office of said Woodward & Dusenberry in New York city, on the return of said certificate, and which said certificate was received by said Hood on behalf of himself and his associates as so much cash."

Upon this and other evidence in the case, the counsel for the defendants (the now plaintiffs in error) asked the court to instruct the jury, that if they should find, from the evidence, that Hood was only authorized to use the note to borrow money thereon for the joint benefit of himself and the other makers thereof, and that at the time the plaintiffs, Woodward & Dusenberry, received the same from Hood, and delivered to him the certificate of deposit, they had notice that Hood so held the note for the said purpose, then the plaintiffs were not entitled to recover of the defendants; which instruction the court refused to give, but did instruct the jury that the certificate of deposit so delivered to Hood was in effect money, and came within the authority to borrow money. Exceptions

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*Poorman et al. v. Woodward et al.*

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were taken to the refusal to give the charge asked for, and to the charge as given.

They claimed that the court erred, insisting that a certificate of deposit is in no sense cash or money; it is simply an acknowledgment of a debt, with a promise of payment; that the transaction between Hood and Woodward & Dusenberry was simply the exchange of one form of negotiable security for another; and that this was clearly a breach of trust, and a perversion of the authority to use the note for the loan of money. And they refer to the following authorities in support of this position: *Thorold v. Smith*, 11 Modern, 71, 87; *Bartlett v. Pintland*, 10 Barn. and Cress., 758; *Atkins v. Owen*, 4 Ad. and Ellis, 819; *Nightingale v. Devisone*, 5 Burr., 2589. Here, Woodward & Dusenberry had six thousand dollars in bank, or a broker's office, and the cashier gave a certificate to that effect, and promised to pay the money to the holder of the certificate who should present it. Hood could have taken out the money the next hour.

A certificate of this kind was a means of advance, that in all probability suited these borrowers, who resided in Ohio, quite as well as the gold or silver would have done. It was to the same effect as if Hood had received the money, and deposited the specie, subject to his own check on the cashier of the bank. This certificate was actually paid in cash to the agent of the parties to the note, for such the *bona fide* holder was.

To maintain, as we are asked in effect to do, that a check on a bank, payable at sight, to order, and endorsed in blank, and which an agent, to raise money on negotiable paper, took as money, and which check was presently paid to a *bona fide* holder by the cashier of the bank, was not money; that the note or bill purchased was not sold for money; that no title passed to the purchaser; and that the principal was not bound by the contract of the agent, would be a startling doctrine in the marts of commerce of this country, where money is usually transferred by bank checks, and may be fairly presumed to change hands on the check being given.

We order that the judgment be affirmed.

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*Dickins's Lessee v. Mahana.*

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**JOHN DOE, EX DEM. FRANCIS A. DICKINS, PLAINTIFF IN ERROR,  
v. ALONZO MAHANA.**

In 1792, Congress granted to certain persons a tract of land in Ohio, upon the condition that they would lay off lots of an hundred acres each to actual settlers, and upon the further condition that the lands which were undisposed of at the end of five years should revert to the United States.

In 1818, Congress directed these reverted lands to be laid off into townships and sections, or into one-hundred-acre lots, and to be sold, with the exception of the usual proportion for the support of schools.

The Secretary of the Treasury had the power to reserve school lots, but the register of the land office had not.

Whether or not the presumption was that the Secretary had exercised this power, was a question to be decided by the jury upon the evidence; and in deciding that it was a legal presumption the court erred.

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of Ohio.

It was an ejectment brought by Dickins's lessee to recover a lot of one hundred acres, being number eight in the donation tract, Marietta district, Ohio, in township nine, range eleven, in the district of lands subject to sale at Chillicothe, formerly in the Marietta district.

In 1849, the office was removed from Marietta to Chillicothe; and in transcribing the book, the words "school land," which were written in the Marietta book upon the plat of the land in question, were omitted in the Chillicothe book. Perhaps this was the origin of the controversy.

Upon the trial in the court below, Dickins's lessee made out his title as follows, viz:

1. A patent issued to Samuel A. H. Marks, on July 1, 1851, which included the lot in question.
2. Conveyances from Marks to the plaintiff.

The defendant claimed under a lease from the trustees of Windsor township, Morgan county, which is composed in part of fractional township nine, range eleven, in the district of lands now subject to sale at Chillicothe, being formerly in the Marietta land district. It was admitted that he had been in

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*Dickins's Lessee v. Mahana.*

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possession from the year 1834, claiming to hold the same as school lands belonging to said township nine, range eleven.

The whole question, then, depended upon the inquiry whether this lot had been set apart as "school land," according to law.

The difficulty arose from the circumstance that this part of the country was not included in the general land system, under which the land reserved for schools is at once ascertained, without the possibility of mistake. But, in 1792, the grant to Putnam and others required that they should lay out the land in lots of one hundred acres each; and as part of it had been settled in that way, it became necessary to lay out the unsettled residue, which reverted to the United States, in lots also of one hundred acres, in order to conform to existing settlements.

In 1818, these reverted lots were ordered to be sold, with the exception of the usual proportion for the support of schools, which the Secretary of the Treasury had the power to select. In order to make out his title, and show that his lot was amongst those thus selected and reserved from sale, the defendant introduced a great deal of record evidence, which it is not necessary to insert in this report, because the decision of this court was, that all that matter should have been left to the jury. They were the proper tribunal to decide whether or not the facts in evidence justified the presumption that the Secretary had selected this lot as "school land." The court decided that this was a legal presumption, and, upon this point, the judgment was erroneous.

The court also erred in deciding that, under the act of 1818, the register had power to select the "school lands."

Under the instructions of the court, the jury found the defendant not guilty, and judgment was entered for him.

The plaintiff sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Coombs* and *Mr. Vinton* for the plaintiff in error, and by *Mr. Hanna* for the defendants.

The precise question decided by this court—that is, that the

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*Dickins's Lessee v. Mahana.*

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jury were to decide upon the presumption of the land being selected as school land according to law, and that it was not a question for the court—was not argued by the counsel; and it is not thought necessary to report their arguments, either for or against the presumption.

Mr. Justice CATRON delivered the opinion of the court.

By the act of 21st of April, 1792, there was granted to Rufus Putnam and others, known as the Ohio Company, one hundred thousand acres of land in the Marietta district, in the territory northwest of the Ohio river. The object of Congress and the grantees seems to have been to cause the country to be inhabited by making donations, through the company, to actual male settlers, of one hundred acres each; and all of the tract not thus disposed of within five years from the date of the grant, reverted, by its terms, to the United States, as public lands. The ordinary laws for surveying by ranges, townships, and sections, did not apply to this tract, nor to the surplus that might revert, as ordinary surveys would have thrown the townships and sections into fractions, by the hundred-acre lots previously disposed of by the company.

By compact, the United States stipulated to give to the State of Ohio one thirty-sixth part of the public lands in that State, for the use of schools; and the 16th section of each township was the land thus contracted to be given, in cases where there were regular surveys in townships of six miles square; and, by the acts of April 30, 1802, and March 3, 1803, (sec. 3,) Congress further stipulates that the lands previously promised "for the use of schools, in lieu of such of the sections number sixteen as have been otherwise disposed of, shall be selected by the Secretary of the Treasury, out of the unappropriated reserved sections in the most contiguous townships."

By the act of March 18, 1818, Congress directed the lands in the Ohio Company's donation tract to be surveyed by the surveyor general, separating that conveyed to settlers from that not conveyed, and belonging to the United States by reversion. This latter land he was to lay off into townships and sections, or into one-hundred-acre lots, conforming them to the



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*Dickins's Lessee v. Mahana.*

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plan observed by the company, when providing for actual settlers. And he was ordered to make returns of the surveys to the General Land Office, and to the register of the land office at Marietta. The lands were laid off into one-hundred-acre tracts, and these tracts the act orders to be sold, "*with the exception of the usual proportion for the support of schools.*" By the President's proclamation, they were offered for sale on the first Monday in June, 1819. There was no reservation to the general order of sale, except of such lands as the Secretary should select, according to the power vested in him by the act of 1803, for the use of schools; and it is a fair presumption, that the register offered all the lands for sale that were not reserved. But the difficulty is, that for the lands in dispute there might have been no bidder when they were offered. That the Secretary had the power to reserve school lots, and to bind the United States and the townships to his selection, is very clear; and we think it is equally clear that the register of the Marietta district had no power to designate these school lots. As a subordinate, he could lawfully record the orders of the Secretary in this respect, but could do no binding act himself.

Six of the lots of one hundred acres each, lying in a body, and square form, together with lot No. 34, adjoining on the east, were not sold, (including No. 8, the lot in dispute.)

On the tract book found in the office of the register at Marietta, and by which the sales of 1819 were governed, the word "school" was written on the plot of each of the seven lots; but whether made as early as 1819, or afterwards, does not appear; nor, whether the then register (Wood) put the designation there by order of the Secretary.

It is admitted that the school commissioners took possession of the land sued for in 1834, and have held it ever since by their lessee; and it is also admitted that township nine, range eleven, which claims the lots marked "school," is without school lands, unless the lots thus designated belong to it as such.

On the return made of the surveys to the General Land Office in 1818, there is no indication that a reservation of any land was made for township nine, range eleven.

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*Dickins's Lessee v. Mahana.*

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The manner in which the Secretary should authenticate his selections was not prescribed by Congress, and depends in this case on evidence not found of record. It must be proved by circumstances, and cannot be proved in any other way.

Another consideration is pressed on the court, on the part of the plaintiff, to overcome the fact that this designation is of no value, to wit: that the Secretary of the Treasury, by his letter of July 13, 1805, directed land equal to one section on the southern part of the donation tract to be laid off as compensation for section sixteen, in township five, range ten, the school tract in township five having been otherwise appropriated; and hence it happened, as is alleged, that the register marked the lots in controversy "school." In 1805, the lots thus marked had not been surveyed, and each one-hundred-acre lot is marked on the tract book of surveys returned in 1818; and as the trustees took the school land for township five, range ten, elsewhere, the argument has not much force.

It is also insisted that, in point of fact, the entire section No. 16, in township nine, range eleven, remained undisposed of by the Ohio Company, and was subject to be appropriated by the commissioners of the township for school purposes; and, therefore, no claim could be set up by them to lands elsewhere. The act of April 30th, 1802, section 7, provides that the 16th section of every township shall be granted to the inhabitants of the same for the use of schools. But, then, the 16th section is a designated portion of land that *may* result from an execution of the public surveys made by the United States, according to the rules and regulations Congress had made or might make. Until ranges were established, and the lands surveyed into townships and sections, no title to any definite land vested in the township. It had no authority to survey and ascertain the 16th section. This authority was reserved exclusively to the United States, and to be exercised as part of the political power. Now, as the 16th section of township nine, range eleven, never was legally ascertained, and as no other evidence could be heard to fix its identity than a survey approved by the department, established for the distribution and sale of the public lands, the assumption that the

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*Dickins's Lessee v. Mahana.*

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land was unappropriated where the 16th section would have fallen, had a survey in fact been made of the township, amounts to nothing. Cases affecting school lands, in Ohio and elsewhere, come under the rule laid down in the noted case of General Green's grant of twenty-five thousand acres, in the military district of North Carolina, (2 Wheat., 19.) The Legislature of that State made the grant by an act of Assembly; having made it, it reserved the power to locate the land by survey through its officers. The land being surveyed, and the survey returned and recorded in the proper land office, it was held by this court that the title attached to the land designated, on the obvious legal ground that the State of North Carolina was estopped to disavow its own act in defining by survey the precise land granted; and so, also, General Green and his heirs were estopped to call in question the validity of the definite location, the authority to locate by survey having been reserved by the granting power. So, here the granting power reserved the right to ascertain and identify the land granted to the schools. Until this was done, no title could be taken of any particular tract; and when the location was made by authority of the United States, each party was estopped to deny its binding force. It was, in fact, a *title* by mutual estoppel.

We now come to the precise case presented on the trial below. The jury were instructed:

1. "That the proofs and legal presumptions sustaining the title of the defendant must have reference solely to, and be based upon, the act of Congress, approved March 18, 1818, entitled 'An act providing for the sale of certain lands in the district of Marietta,' &c., in connection with the act of the 21st of April, 1792, granting to Rufus Putnam and others, as agents and trustees, one hundred thousand acres, called the donation tract; and that, in the absence of any express authority to any other officer to make the selection of school lands in said donation tract, by a fair construction of said act of 1818, the register of the land office at Marietta rightfully exercised such authority."

2 "That all the evidence and admissions of facts in the

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*Dickins's Lessee v. Mahana.*

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case raised a legal presumption that the said register of the land office at Marietta had exercised the authority so vested in him by said act of March 18, 1818, prior to the entry and patent under which the plaintiff claims title, by legally selecting the lands in controversy in this suit (with other lands) for the support of schools in said township nine, in range eleven, and it was therefore their duty to return a verdict for the defendant."

The first instruction assumes that the act of 1818 authorized the register to select the school lots in the donation tract; whereas the third section of the act of March 3, 1808, conferred the exclusive power on the Secretary of the Treasury, and therefore the instruction is erroneous.

The second instruction declares that the evidence and admissions of facts in the case raised a *legal* presumption "that said register had exercised the authority vested in him by the act of 1818, prior to the entry and patent under which the plaintiff claims title," &c.

As the register had no power to select, it could not be held that he had legally selected; nor did he make the entry on the tract book in due form, had he been instructed by the Secretary to record his selection.

The word "school," appearing on the tract book, has much significance; but, standing alone, it did not authorize the Circuit Court to presume, as matter of *law*, that the lands had been selected by order of the Secretary. If his letter to the register, directing him to make the selection, had been produced, and taken in connection with the designation, then we think the court would have been warranted in making the legal presumption.

The narrow point in this cause is, Did the Secretary select the land in controversy (with other lots) for the use of schools? If he did, then the title of the United States was divested thereby, and the lands withdrawn from sale. There are numerous facts tending to prove that they were selected. 1st. They were not sold, nor is it at all probable that they were offered for sale, in 1819. If they are of good quality, and favorably situated, a jury may be satisfied that, had they been

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*Hill v. Smith et al.*

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offered to bidders at the public sale, they would have been purchased. 2d. They were claimed as school lands, selected for township nine, range eleven. 3d. The trustees for the township took possession of them, and leased them out as early as 1834; and their tenant is yet in possession, and here sued. 4th. The endorsement, on the plat of the lots, of the word "school," indicates, to some extent, that they had been selected by the proper authority. What weight this may have, it will be proper to leave to the jury. 5th. That this township had no school lands assigned to it, unless the lots referred to were assigned.

These facts, with others, were proper to be submitted to the jury, from which they might have presumed that the lots had been duly selected.

In the language of the Supreme Court of Ohio, in the case of *Coombs and Ewing v. Lane*—"Facts presumed are as effectually established as facts proved, where no presumption is allowed." That was a suit for the possession of this same land, and involved the same evidence this case does, and presented the same questions of law. But there, the cause was submitted to the Circuit Court on the law and the facts, without the intervention of a jury; and the Supreme Court was appealed to in order to reverse the opinion of the lower court, on a motion for a new trial. The State courts dealt with both facts and law; whereas, here, the jury must deal with the facts and presumptions, under the instructions of the court, as respects the law.

We order the judgment of the Circuit Court to be reversed, and remand the cause for another trial.

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**HENRY HILL, PLAINTIFF IN ERROR, v. CALEB B. SMITH AND OTHERS.**

Where it appeared from the record that a party sold land to a railroad company, the price of which was paid in the stock of the company, guaranteed by certain persons to be at par after a named time, and suit was brought upon this written contract, the case does not appear to be open to a demurrer by the defendants, and the judgment of the court below sustaining such a demurrer must be

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*Hill v. Smith et al.*

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reversed. It is an original contract, and, being declared on as such, the plaintiffs are entitled to judgment.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was an action brought upon the contract recited in the opinion of the court, to which there was a general demurrer, which was sustained by the Circuit Court.

Hill, who was the plaintiff, then brought the case up to this court by a writ of error.

It was submitted on a printed argument by *Mr. O. H. Smith* for the plaintiff in error, no counsel appearing for the defendants.

*Mr. Smith* made the following points

*First.* That the Circuit Court erred in sustaining the demurrer to the *first* and *second* counts, and each of them; to sustain this position, we rely upon the positions above, and authorities cited, to sustain the *third, fourth, fifth, sixth, seventh, and eighth* points.

*Second.* That the court erred in sustaining the demurrer to the whole declaration, if there be one good count, or part good of a *divisible* count.

1 Chitty, p. 665, Ed. 1855, notes c (8) and authorities.

*Third.* The guaranty set out in the *first* and *second* counts was an *original* undertaking of the appellees, and is binding in law.

4 Maule and Selw., 66; 8 East., 281.

1 Johns. R., 362; 1 Parsons on Con., 480.

2 Howard, 450; 12 East. R., 227.

Cowper R., 714; Chitty on Con., 80, 81.

1 Parsons on Con., 495.

6 E. C. L. R., 32; 41 E. C. L. R., 848.

1 How., 187; 10 Pet., 493.

*Fourth.* The whole contract set out in the *first* and *second* counts being in writing, and founded upon a sufficient consideration, was obligatory upon the parties.

10 Moore R., 395; 3 Bing. R., 107.

8 Cush. R., 159; 15 Penn. St. R., 156.

*Fifth.* Suppose the undertaking of the appellees to be col-

*Hill v. Smith et al.*

lateral to a contract of the railroad company, the undertaking or guaranty is valid in law, and binding on the appellants.

2 How. R., 426; 7 Cranch R., 69.

10 Peters R., 482; 7 Peters R., 122.

10 Moore R., 395; 3 Bing. R., 3, 107.

14 Illinois R., 237; 15 Penn. St. R., 27.

2 Story on Con., p. 400, sec. 862, and authorities cited, Ed. 1857.

17 Peters R., 161; 5 B. and Ad., 1109.

Mood. and Al. R., 394.

*Sixth.* Neither the railroad company nor their guarantors can set up the illegality of their *executed* contract, either at law or in equity, without placing the parties *in statu quo*.

4 Blackf., 515; 5 Blackf., 441.

7 Blackf., 55; 8 Blackf., 409, 469.

Adams Equity, 191.

1 Story on Con., p. 601, sec. 497, note 2, Ed. 1857.

Hill on Trustees, p. 221, Ed. 1857.

*Seventh.* The third count sets out an original, independent contract between the appellant and the appellees, founded upon a sufficient consideration, and the facts being admitted by the general demurrer, raising no question as to the form, is valid in law, and the demurrer to the whole declaration should have been overruled.

1 Parsons on Con., 497, and authorities.

37 E. C. L. R., 120; 2 McLean, 108.

8 McLean, 387; 1 Story on Con., p. 580, sec. 481.

Ib., p. 544, sec. 551.

*Eighth.* The undertaking of the appellees is valid and binding, whether an action could be maintained against the railroad company or not.

1 Burr. R., 371; 1 B. and Ald., 297; 15 E. C. L. R., 47.

1 Stark. R., 14, 19; 2 E. C. L. R., 16, 18.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiff's demand is founded on the following contract, dated August 17th, 1858, signed by defendants, and set forth at length in the declaration:

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*Hill v. Smith et al.*

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"Whereas Henry Hill, of Delaware county, has proposed to convey to the Cincinnati, Newcastle, and Michigan Railroad Company a certain tract of land in Delaware county, containing three hundred and nine acres, for the consideration of six thousand one hundred dollars, to be paid in the capital stock of said company, at par, on the condition that Caleb Smith and other responsible persons will guaranty that the said stock shall be worth par in three years from the present date, and in default thereof, that the company shall make it up to par; and whereas the said Cincinnati, Newcastle, and Michigan Railroad Company have agreed by a resolution of their board of directors to accept said proposition: Now, we, the undersigned, in consideration of the premises, hereby guaranty to the said Henry Hill, that the said stock shall be worth par in three years from the date of this instrument; and if at the expiration of that date said stock shall not be worth par, we guaranty the said Henry Hill that the said Cincinnati, Newcastle, and Michigan Railroad Company shall make up to him or pay him whatever sum the said stock shall be worth less than par, so as to make the said stock worth par to said Henry Hill at that date."

The declaration is in proper form, and contains all the averments necessary to show a breach of this contract, and the consequent liability of defendants.

There was a general demurrer to the declaration and judgment for the defendants.

As we have not been furnished with an argument on behalf of defendants, we are at a loss to discover on what grounds it is supposed that this judgment can be supported.

As the contract is in writing, signed by the parties to be charged, it cannot be affected by the statute of frauds; and, although the term "guaranty" is usually applied to a collateral undertaking to pay the debt of another, yet when taken in connection with the other terms of the instrument, this is clearly an original, independent contract. If it had been under seal, the term "*covenant*" would have been the technical synonym for the word "*guaranty*" as here used.

It states that the defendant would not agree to sell his land



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*Ford v. Williams.*

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in exchange for stock, except on condition that defendants should guaranty that the stock in three years would be worth par, or should be made so by the corporation. For this consideration, defendants agree to make it so, or, in other words, to pay the difference between the cash value of the stock on that day and its nominal value.

On this condition and for this consideration, the plaintiff agreed to convey his land to the railroad company; and, on the faith of defendants' undertaking, he has conveyed it, and accepted, not money, but certain stock, which defendants have agreed to make equal to money by a certain day. The declaration avers, that at the time specified the stock was wholly worthless, and of no value, and the railroad company utterly insolvent, and unable to pay the difference; and that defendants, having full notice of these facts, refuse to comply with their contract.

There is no reason why this contract should be treated as void because of an illegal or immoral consideration. Its conditions require no previous suit to be instituted against any one as principal debtor. The declaration contains every necessary averment: a valid contract, a large consideration paid, and a breach of the contract by defendants; all set forth in proper and technical language.

The plaintiff is therefore entitled to judgment on the demurrer, unless the court below, in their discretion, shall permit the defendants, on payment of costs, to withdraw their demurrer, and plead some good defence in bar.

The judgment of the court below is reversed, and record remitted for further proceedings.

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**BENJAMIN FORD, PLAINTIFF IN ERROR, v. JOHN S. AND HERMAN WILLIAMS.**

Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract; and, although the

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*Ford v. Williams.*

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contract be in writing, parol evidence is admissible to show that the agent was acting for his principal.

[MR. JUSTICE WAYNE DID NOT SIT IN THIS CASE.]

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

Ford lived in New York, and brought an action against John S. Williams & Brother upon the following contract:

BALTIMORE, October 31, 1855.

For and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, we have this day purchased from John W. Bell, and agree to receive from him in all the month of February next, at his option, two thousand barrels Howard street super flour, we paying for the same at the rate of nine dollars per barrel, on the day the said flour is ready for delivery. JOHN S. WILLIAMS & BRO.

Upon the trial in the court below, much evidence was given which it is not necessary to recite in the present aspect of the case. The court, on the application of the defendants' counsel, instructed the jury that, upon the above contract, Ford could not recover. The only question in the case was whether, assuming the contract to have been made for the benefit of the plaintiff, without any disclosure to the defendants of his interest, he was competent to maintain a suit in his own name.

It was argued by *Mr. Brown* for the plaintiff in error, and by *Mr. Nelson* for the defendants.

The case of the New Jersey Steam Navigation Company v. The Merchants' Bank (6 Howard, 381) was considered to be decisive of the question.

There is no marginal note in the report of that case, showing that the point was made. The reason was, that there were eight judges upon the bench, only three of whom concurred with Mr. Justice Nelson in the opinion which he delivered, although Mr. Justice Woodbury concurred in the judgment. There being no opinion, therefore, of the court, as such, the

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*Ford v. Williams.*

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reporter did not think himself authorized to insert in his head note all the points ruled in the opinion delivered by Mr. Justice Nelson.

Mr. Justice GRIER delivered the opinion of the court.

The single question presented for our decision in this case is, whether the principal can maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal.

It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. "Such evidence (says Baron Parke) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal." (See *Higgins v. Senior*, 9 Meeson and Wilsby, 848.)

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the States, but by this court

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*Lownsdale et al. v. Parris*

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(See *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How., 381, et cas. ib. cit.)

The judgment of the court below is therefore reversed, and a *a venire de novo* awarded.

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DANIEL H. LOWNSDALE AND OTHERS, APPELLANTS, *v.* JOSIAH L. PARRISH.

Congress passed no law in any wise affecting title to lands in the Territory of Oregon until September, 1850; and therefore where a controversy arose, in July, 1850, relating to titles to land, neither party could be said to have a legal title.

Consequently, the amount in controversy could not be ascertained, so as to bring the case within the jurisdiction of this court; and there is no question arising under the Constitution or laws of the United States so as to give jurisdiction.

THIS was an appeal from the Supreme Court of the Territory of Oregon.

The facts are stated in the opinion of the court.

It was argued by *Mr. Gillet* and *Mr. Johnson* for the appellants, and *Mr. Baxter* for the appellee.

The arguments of the counsel were directed chiefly to the merits. On the point of jurisdiction, *Mr. Baxter* gave an account of the singular spectacle exhibited by the American settlers in Oregon, who established a provisional Government amongst themselves, whilst the entire Territory was still in the joint occupancy of the United States and Great Britain. *Mr. Baxter* then referred to the act of Congress passed on the 14th of August, 1848, (9 Stat. at L., 329,) which contained the two following clauses, viz:

“And the existing laws now in force in the Territory of Oregon, under the provisional Government established by the people thereof, shall continue to be valid and operative therein, so far as the same be not incompatible with the Constitution of the United States, and the principles and provisions of this act.

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*Lowsdale et al. v. Parrish.*

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"But all laws heretofore passed in said Territory, making grants of land, or otherwise affecting or encumbering the title to lands, shall be and are hereby declared to be null and void."

*Mr. Baxter* examined the whole law, and inferred that its true construction was to declare the existence of such general laws of the United States in Oregon as might be executed by the judicial and executive authorities thus created, or such general authorities as then existed over the whole territory of the United States, but did not intend to extend over Oregon such special legislation as required special organization, not then existing in the Territory, to execute them. And when this town was laid off, the land law of Oregon had assured quiet possession of the tract of 640 acres to Pelligrove and Lovejoy, and those claiming under them, as long as the provisional Government continued. That all purchasers of town lots from these proprietors obtained a title to their lots, and the easements connected with them, grafted on, springing out of, and sustained by, the right of possession under the provisional Government; and the contracts for sales and purchase of these lots under the provisional Government were valid.

That the 17th section of the law establishing the Territorial Government affirmed these contracts, and they were valid and in force under the laws of the Territory. And there is nothing in the 6th or 14th sections of the act of 1848 inconsistent with this. This suit having been commenced before the passage of the land laws of 1850, must be decided on the laws of the provisional Government and the Territorial Government, and it was the duty of the courts of equity to preserve the rights of the parties as they stood under the laws of the provisional Government and the Territorial Government, and to enjoin all irregular proceedings in violation of those rights, until titles were granted by the Government of the United States, under the land laws of the United States.

Mr. Justice CATRON delivered the opinion of the court.

Parrish filed his bill in equity against Lowsdale and others in a District Court of Oregon Territory, praying for an injunction to restrain the defendants from obstructing a narrow

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*Lownedale et al. v. Parrish*

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piece of land, claimed as Water street, lying in front of the complainant's storehouse, and a square of ground claimed as his, two hundred feet on each side, laid off into eight lots, as city property, within the city of Portland, and on one of which the storehouse stands. The strip of land lying in front of these lots extends to the Wallamette river; at that point, the land is several hundred feet wide. The complainant alleges that it was dedicated to the public as a street, to the use of the proprietors of the town, for the purposes of commerce; the river there being within the flow of tide, navigable for ships, and requiring a wide front space to accommodate loading and discharge of cargoes.

The District Court found that Water street, in the city of Portland, was bounded by the river, opposite the lots of the complainant; and that the defendants at the commencement of the suit were about to obstruct the same, to the special injury of the plaintiff, as stated in the bill; and thereupon an injunction was granted, as prayed for. This decree was affirmed in the Supreme Court of Oregon, where the respondents carried the cause by appeal, and from that decree they have appealed to this court, and we are called on to revise the proceedings below.

The first question presented is, whether this court has jurisdiction and power to re-examine the controversy.

By the act of Congress organizing the inhabitants of Oregon Territory into a Government, it is provided (sec. 9) that writs of error and appeals from final decisions of the Supreme Court of Oregon shall be allowed to the Supreme Court of the United States, where the value of the property, or the amount in controversy, shall exceed two thousand dollars, to be ascertained by the oath of either party, or by a competent witness; and also in cases "where the Constitution of the United States, or an act of Congress, or a treaty of the United States, is brought in question."

The complainant assumes that he would sustain special damage by the obstruction of the space between his property and the river, but how much damage does not appear from the allegations in the bill, or otherwise; and it is difficult for us to

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*Lounsedale et al. v. Parrish.*

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see how either party to the suit could sustain damage to his rights of property, as the town was laid off in 1845, on property of the United States, whilst our inhabitants who had emigrated there, and those of Great Britain, held joint possession of the country in virtue of the treaty between the two nations of October 20th, 1818, (art. 13,) which was continued in force by the convention of August 6th, 1827.

In June and July, 1845, the people of Oregon Territory, "for mutual protection, and to secure peace and prosperity among themselves," elected delegates, who met in convention, and adopted laws and regulations for their government, "until such time (say they) as the United States of America extend jurisdiction over us." In this plan of Government, it is provided that any one wishing to establish a claim to land shall designate the extent of his claim by line-marks, and have it recorded in the office of the Territorial recorder; the claim not to exceed a mile square, or 640 acres. The description of claim under which the complainant and the respondents set up title is founded on this regulation. By the treaty of 15th June, 1846, the line dividing our possessions and those of Great Britain west of the Rocky Mountains was concluded; and on the 14th of August, 1848, Congress passed an act to establish the Territorial Government of Oregon, in which the laws then existing under the provisional Government (established by the people) are continued, and declared to be operative until altered. "But (says the act, sec. 14) all laws heretofore passed in said Territory, making grants of land, or otherwise affecting or encumbering the title to lands, shall be, and are hereby declared to be, null and void." Congress passed no law in any wise affecting title to lands in Oregon Territory till September 27, 1850; and the bill in this case was filed July 29, 1850, so that, when the litigation commenced, neither party to the suit had any title to or interest in the land whatever; and therefore the respondents and appellees could not sustain injury by being enjoined not to erect buildings on lands belonging to the Government in which they had no interest. It is proper to remark here, that we have nothing to do with, nor can we notice, rights acquired to this

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*Morehouse v. Phelps.*

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property by acts of Congress passed subsequently to the origin of this controversy.

Neither the Constitution of the United States, nor an act of Congress, or a treaty, was "*brought in question*" in the lower court; neither side could have legitimately raised such a question, and called for its decision; and to give this court jurisdiction of the *case*, in this instance, the question must have been raised and decided in the lower courts, and it must so appear on the record. (16 Peters, 281.)

Being of opinion that there is no jurisdiction in this court to examine and revise the decree of the Supreme Court of Oregon, we order the appeal to be dismissed.

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DICKERSON B. MOREHOUSE, PLAINTIFF IN ERROR, *v.* WILLIAM A. PHELPS.

By the acts of Congress passed in 1829, (4 Stat. at L., 334,) and 1836, (5 Stat. at L., 79,) commissioners were to be appointed to hear and determine all claims to lots of ground in the town of Galena, Illinois, and to give a certificate in favor of each person having the right of pre-emption.

Where a person presented his claim as the legal representative of a settler, obtained the certificate, and afterwards a patent to the legal representatives, it inured to the benefit of the person who had presented the claim, obtained the certificate, paid the money, and procured the patent.

Where this person acted for himself individually, and also as the administrator of his co-tenant who was dead, it was his duty and right, under the laws of the State, to pay both shares of the purchase-money.

One standing outside, who took no interest in the claim for many years after it was passed, and then claimed under a deed made by the settler in 1829, alleging that he was the proper legal representative, had not such a title as would enable him to maintain an action of ejectment.

The cases under incipient Spanish titles do not apply to this case, because the United States were the absolute owners of the lots in question, and could dispose of them at their pleasure.

THIS case was brought up from the Supreme Court of the State of Illinois by a writ of error, issued under the twenty-fifth section of the judiciary act.

Phelps, who was the plaintiff in the court below, brought an ejectment for the undivided half of two lots in the town of



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*Morehouse v. Phelps.*

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Galena, Illinois, viz: lots number eight and nine, each lot fronting forty-seven feet, more or less, on Water street.

Upon the trial, Phelps made out his title as follows:

1. A deed, or rather notification in his favor, addressed to the superintendent of lead mines, from R. P. Guyard, dated November 8, 1829.

2. A certificate of the register of the land office at Dixon, dated October 3, 1850, stating that the legal representatives of R. P. Guyard and D. B. Morehouse did, on the 20th of February, 1838, purchase of the General Government lots number eight and nine.

This certificate was issued under the following acts of Congress, viz:

The Congress of the United States, by an act approved February 5, 1829, provided for the laying off of a town at and including Galena, Illinois, under the direction of the surveyor general for the States of Illinois, Missouri, and the Territory of Arkansas. The act further provided that the lots should be classed, &c., and, previous to their sale, "each and every person, or his, her, or their legal representative, or representatives, who shall heretofore have obtained from the agent of the United States a permit to occupy any lot or lots in the said town of Galena, or who shall have actually occupied and improved any lot or lots in the said town, or within the tract of land hereby authorized to be laid off into lots, shall be permitted to purchase such lot or lots by paying therefor in cash," &c., being the certain amounts specified in the said act, according to the class in which the same fell.

It not being practicable to carry this act into effect, Congress, on the 2d day of July, 1836, passed an amendatory act, by which it was further provided, &c.:

"That all acts and duties required to be done and performed by the surveyor of the States of Illinois and Missouri and the Territory of Arkansas, under the act to which this is an amendment, shall be done and performed by a board of commissioners, three in number, any two of whom shall form a quorum to do business; said commissioners to be appointed by the President of the United States, and shall, previous to their

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*Morehouse v. Phelps.*

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entering upon the discharge of their duties, take an oath or affirmation to perform the same faithfully and impartially."

And it was further enacted, "That the said commissioners shall also have power to hear evidence and determine all claims to lots of ground arising under the act to which this is an amendment; and for this purpose the said commissioners are authorized to administer all oaths that may be necessary, and reduce to writing all the evidence in support of claims to pre-emption presented for consideration; and when all the testimony shall have been heard and considered, the said commissioners shall file with the register and receiver of the land office at Galena the testimony in the case, together with a certificate in favor of each person having the right of pre-emption; and upon making payment to the receiver at Galena for the lot or lots to which such person is entitled, the receiver shall grant a receipt therefor, and issue certificates of purchase, to be transmitted to the General Land Office, as in other cases of the sale of public land."

3. Patents, issued for the lots on the 1st of January, 1846, stating that the lots had been purchased by the legal representatives of Guyard and Morehouse, and granting the land to said representatives.

4. The record book of the commissioners, deciding that the legal representatives of Robert P. Guyard were entitled to a pre-emption to one undivided half of lots number eight and nine, and Dickerson B. Morehouse the other half of said lots.

5. The acts of Congress above mentioned.

6. Evidence respecting the location of the lots.

The defendant then offered the following evidence:

1. The letters of administration, granted in March, 1836, to Morehouse, upon the property of Guyard.

2. The acts of Congress before referred to.

3. The evidence of one of the commissioners, showing that Morehouse appeared before the board and filed his claim, and that the deed to Phelps was never before the board or offered in evidence before the commissioners.

4. The certificate of the commissioners that the legal repre-

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*Morehouse v. Phelps.*

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sentatives of Guyard and Morehouse were entitled to the pre-emption of lots number eight and nine.

5. The record and proceedings of the General Land Office, showing that they had improved the lots and paid the money due on them.

6. The petition of Morehouse, as administrator, for leave to sell the real estate of Guyard, in order to pay the debts of the estate.

7. The deposition of Hempstead, that, as agent for Morehouse, he procured the patents.

8. The patents issued, as before stated.

9. Other evidence, to show that Morehouse had always been in possession.

There were nine prayers to the court offered by the counsel for the plaintiff, and two by the defendant. The following being one of the prayers offered on behalf of the plaintiff, which was given, together with the second prayer asked by the defendant, and refused, appears to state the principal points in the case, upon which the decision of the court below turned :

“6th. The legal representatives, as used in this law, is the party in interest whose identity was uncertain, and who succeeded to the rights of Guyard. It means the party who legally represents the interest which was once vested in Guyard, and by virtue of which right the law authorized the lots to be entered; and if the jury believe from the evidence that Guyard was entitled to a pre-emption to the lots in controversy, and parted with all his interest to Phelps by his deed in 1829, then Phelps is the legal representative, and the jury should find for the plaintiff.”

“2d. That if the jury find from the evidence that Dickerson B. Morehouse was, as stated in the first instruction, the sole administrator of Guyard, and that in that capacity he claimed, before the commissioners appointed under the supplementary act of the 2d July, 1836, to be entitled to the lots in dispute by pre-emption title, and that the said commissioners heard and considered all the evidence offered in support thereof, and that neither the plaintiff nor any other person ever claimed the same before said commissioners at any time; and if they fur

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*Morehouse v. Phelps.*

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ther find that the commissioners did thereupon decide said administrator to be entitled to said lots as the legal representative of Guyard, and did file with the register and receiver at Galena the testimony in this case, together with their certificate in favor of said administrator; and that he did thereupon, and as administrator of Guyard, pay the purchase-money for said lots to such receiver, and obtain his receipt therefor, and his certificate of purchase, and that these were by him transmitted to the General Land Office, and the patents issued offered in evidence by said defendants were sent to him, and have been in his possession ever since, claiming to be owner of the lots therein mentioned, and that these are the lots in dispute in this case; that then the said defendant is the owner of said lots by virtue of said facts, and according to the construction of the said acts of Congress of the 5th February, 1829, and the 2d July, 1836, and that therefore the plaintiff is not entitled to recover."

Refused.

The jury found a verdict for the plaintiff; and the case being carried up to the Supreme Court upon exceptions, the judgment was there affirmed.

A writ of error brought the case up to this court.

It was argued by *Mr. Washburne* and *Mr. Reverdy Johnson* for the appellant, and *Mr. Blair* for the appellee.

The principal point was thus stated by the counsel for the appellant:

The question arising in this court upon the record is, who is the "legal representative" of Guyard, as to the lots in dispute, within the meaning of the statutes of the United States? Phelps claims that he is, by virtue of the letter, or instrument, above set out; Morehouse claims that he is, as administrator of Guyard, he having made the claim to the lots before the board of commissioners, which claim was allowed, and entered them at the land office. The Supreme Court of Illinois have held that, under these statutes, Phelps is the "legal representative" of Guyard. This question is presented in the instruc-

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*Morehouse v. Phelps.*

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tions asked for by the attorneys for Phelps, and given by the court below, and in the instructions asked for by the attorney of Morehouse, and refused by the court below.

The construction of the statutes above referred to being drawn in question in this case, the Supreme Court of Illinois made the certificate as found in the record.

It is submitted that the term "legal representative," as used in the act of February 5, 1829, clearly contemplates only those representatives who file their claims before the board of commissioners, and have them allowed. If one be a "representative," and he does not prefer his claim as such for confirmation, he is not regarded.

Landes et al. v. Perkins, 12 Missouri, 255.

In *Strother v. Lucas*, (12 Peters, 458;) the confirmation was deemed to be made to the person *who made and proved his "claim" before* the board of commissioners. To the same point, see *Bissell v. Penrose*, 8 Howard, 337; Instructions and Opinions of Attorneys General, part 2, pages 747, 752, 1043; also, *Boone v. Moore*, 14 Missouri, 424; 6 Peters, 772; 2 Howard, 284; 4 Gillman, 454; 12 Illinois, 317; 15 Illinois, 572; Land Laws, vol. 3, 816; 2 Bay, 426—454; 16 Howard, 63.

Whatever right Phelps might have had, it was only an inchoate right, to be perfected by making his claim before the board of commissioners, and procuring their award upon satisfactory proofs, and then following it up by a purchase from the land office. He could do these things, or he could abandon his supposed right. He did so abandon it. On the other hand, Morehouse, as the administrator of Guyard, made the claim before the board of commissioners, adduced his proofs, received their award, and then perfected the title by entering the lots, the possession of which he has retained to this day. Under these circumstances, it is insisted that Morehouse, as the administrator of Guyard, is the "legal representative" of said Guyard, within the true intent and meaning of the act of 5th of February, 1829, authorizing the laying off a town on Bear river, &c.

Gale's Statutes of Illinois, 706, 711.

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*Morehouse v. Phelps.*

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*Mr. Blair*, for the defendant in error, made the following points:

I. The first point made for the defendant in error is, that the decision of the Supreme Court of Illinois does not involve the construction of any statute of the United States.

The only question decided by that court was, which of the parties was the legal representative of Guyard. This is a question not regulated by those or any other statutes of the United States, and is not determinable by the construction of those statutes, but depends wholly upon the local or State law, by which alone the subject of *representation*, or the manner of transmitting and transferring rights in things, is regulated. Whilst, therefore, the question was as to who was intended by the words "legal representative," contained in the act and patents, and the object was to apply the description contained in these words, this was not to be done by the Supreme Court of Illinois, by any construction of the act containing them, which the law gives this court power to revise; but the meaning was to be ascertained by reference to the State law, which alone defines and fixes the legal representatives of all persons having rights to real property within the State, whether such rights were acquired from the United States or otherwise. And this court could as well take jurisdiction to ascertain to whom a deed inured made by an individual to the legal representatives of Guyard, or on a question of the identity of the grantee, as in this case.

II. The judgment of the Supreme Court of Illinois, if revised, should be affirmed. The fact relied on by the plaintiff in error to give him the title is, that he presented the claim to the board as administrator of Guyard, and obtained the award of the board, patents, &c. There are two answers to this:

1. That the fact relied on is contradicted by the record of the board, which is conclusive. According to this record, it was the legal representatives of Guyard who presented the claim and obtained the award; and as Phelps was the legal representative, he must be deemed to have presented it. And though it may be held, if the oral testimony in the case can be

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*Morehouse v. Phelps.*

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considered on such a question, that Phelps did not in fact present the claim, and that Morehouse did, it is equally certain that Morehouse did not present it in his character as administrator, and must, from the manner in which he did present it, be deemed to have presented it for whom it might concern. The language of the entry clearly repels the idea that he presented it as administrator; and the fact that he was not entitled as administrator to the award, and therefore could not have obtained it, is equally conclusive. There is no reason, indeed, for supposing the award of the undivided half of these lots to Guyard's legal representatives vested the title in his administrator, except that the claim on behalf of Guyard's legal representatives was presented by Morehouse, and that he was, at the time of exhibiting the claim, the administrator of Guyard. But Guyard's interest in the lots was not vested in him as administrator, any more than his own interest, (with which he necessarily presented Guyard's;) *Mackay's Adm'r v. Bandine*, (7 Mo., p. 374;) and it might therefore be said, with equal propriety, that he presented his own claim in his character as administrator, as that he presented Guyard's in that character.

2. But if it be conceded that Morehouse is the patentee, as administrator of Guyard, this would not affect the result. He could take in this way only as Guyard himself would have taken, if he had been living, and the land had been patented to him. For as, in that case, the title would have inured to the grantee of Guyard, it must also inure to his grantee when conferred on one who is merely substituted to his rights and obligations. It was not questioned in the much-contested case of *Strother v. Lucas*, (6 Peters, 772; 12 ib., 448,) that the confirmation to Chouteau inured to Lucas, his grantee, by deed made prior to the confirmation; and in the cases of *Stoddard v. Chambers*, (2 Howard, 816,) and *Landis v. Brant*, (10 ib., 348,) where the point was made, this court decided that the confirmations and patents to Clamorgan and Bell inured to McNair and Stoddard, their respective grantees, by deeds made prior to the confirmations.

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*Morehouse v. Phelps.*

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Mr. Justice CATRON delivered the opinion of the court.

Phelps recovered of Morehouse the undivided moiety of lots Nos. 8 and 9 in the town of Galena, in a State Circuit Court in Illinois, which judgment was affirmed in the Supreme Court of that State; and from this decision the cause is brought here on writ of error. We are now called on to re-examine the controversy to the extent that acts of Congress, and the proceedings of officers acting under the authority of the United States, are drawn in question.

Phelps claims, through a paper addressed to the agent of the United States superintending the lead mines at Fever river; and this paper his counsel assumes to be a deed that conveys lands. It bears date November 8, 1829, and is from Guyard to Phelps, for a moiety of the lots in dispute.

The courts of Illinois held it to be an effective conveyance of title, and that, by force thereof, Phelps became "*the legal representative*" of Guyard, within the intent and true construction of the patents made to the representatives of Guyard and Morehouse.

The act of 1836 required that commissioners should *hear and determine* all claims to lots of which a preference of entry was sought, according to the act of 1829; they had power conferred on them to administer oaths and take evidence, and were directed to reduce it to writing, in support of claims to pre-emptions presented for consideration; and, when all the testimony was heard and considered, they were to file with the register and receiver the whole testimony in the case, (that is, in all the instances,) together with a certificate in favor of each person having the right of pre-emption; and on payment being made to the receiver by the person ascertained to be entitled, the register was ordered to issue a certificate of purchase to him to whom the right of pre-emption had been adjudged; and the remaining lots were to be exposed to public sale.

It was the political power that was dealing with this property. Congress could award it either for a consideration, or confer it on any one that they desired should have it. The awards were made through a tribunal exercising the political power, and whose adjudications were conclusive of the right



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*Morehouse v. Phelps.*

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to purchase; nor had the courts of justice any jurisdiction to interfere.

Phelps did not come forward and prefer a claim to have a pre-emption allowed, and if Morehouse had not acquired this right, the land would have been sold at auction; Phelps would have then stood in the situation of all others claiming preferences of entry throughout the public domain, who fail to prove up their claims before the register and receiver, and permit the land to be sold at the public sales. He abandoned his preference, and allowed it to be *forfeited*—even conceding its original validity.

2. If Phelps has a legal title, he took it by the terms of the patents. The patent for No. 9 recites, that the legal representatives of Robert P. Guyard and Dickerson B. Morehouse had deposited in the General Land Office the register's certificate at the land office at Galena; that full payment had been made, by said legal representatives above named, for lot No. 9, (the boundary of which is described,) and which lot had been purchased by said representatives of Guyard and Morehouse; and, in consideration of the premises, the United States have given and granted, and do give and grant, "unto the said representatives of Guyard and Morehouse, and to their heirs, the said lot above described; to have and to hold, unto the said representatives, and their heirs and assigns, forever, as tenants in common." The patent for lot No. 8 is in the same terms.

For the purpose of explaining who the grantees are, and that they were the purchasers, extrinsic proof was introduced in the State Circuit Court, to the end of establishing the fact that Morehouse, as administrator of Guyard, and on his own behalf, proved the joint occupancy of lots 8 and 9 before the commissioners appointed to grant certificates of pre-emption under the act of 1836; that Morehouse obtained certificates of pre-emption, filed them with the register, paid the purchase-money to the receiver of the land office at Galena, took out his patent certificates, presented them at the General Land Office, and received the patents. The deed to Phelps was produced and recorded at Galena, June 18, 1847. Morehouse obtained his pre-emption certificates for lots Nos. 8 and 9, paid his money

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*Morehouse v. Phelps.*

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for them, and got his patent certificate February 20, 1838, and on the 1st day of January, 1846, the patents issued.

We feel confident, from the face of the patents, that they were made for the benefit of those who obtained the certificate of pre-emption, and paid for the land. Such, in our judgment, is the fair construction of the patents, and of the second section of the act of 1836, on which they are founded. The patents, throughout, refer to those who bring the claim before the board, obtain the right of entry, pay the purchase-money, and enter the land.

It was the duty of Morehouse, as administrator of Guyard, to make payment for the moiety of the lots Nos. 8 and 9, on behalf of the estate of Guyard, out of the personal property in the administrator's hands. (Revised Statutes of Illinois, title Wills, sec. 107; adopted in 1836.)

And by the 98th and 99th sections of said title, the administrator was empowered to convert the lands into personal assets for the payment of debts; the personal estate having proved insufficient.

The capacity of Morehouse to cause the entry to be made, depends on State laws, with which we have no power to deal in the present writ of error, further than to ascertain from them that Morehouse was, in his capacity of administrator, "the legal representative" of Guyard; and such we think he was, and that the patents are technically accurate.

As Phelps was plaintiff in the ejectment suit, and Morehouse in possession, it was imposed on Phelps to show a valid legal title to authorize a recovery of the land by him; and having no such title, Morehouse's possession was sufficient for his protection.

The decisions referred to on behalf of the defendant in error, where Spanish claims had been confirmed, and where the United States gave an additional sanction to an incipient title existing when we acquired Louisiana, do not apply. In those cases, titles which were undoubtedly private property, that could be alienated, and which descended, were examined, and their validity ascertained; and when found meritorious, ordered to be defined by survey, and a United States patent was

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*Brown et al. v. Huger.*

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in most cases ordered to be issued. But this did not defeat outstanding interests in the land for which the patent issued; as was held in the cases of *Stoddart v. Chambers*, *Russell v. Penrose*, and *Landes v. Brant*. The patent covered the whole title; at least, from the time it was asserted before a board of commissioners appointed by Congress to investigate the claim; and the patent inured to the protection of alienees and heirs. The United States Government was bound to protect existing interests in the lands acquired by the United States from France, by the treaty of 1803.

Here, however, a very different claim to the lands in the town of Galena is set up. The Government was the absolute owner; Congress might have repealed the acts of 1829 and 1836, at any time before actual purchases were made by those claiming a preference to enter, and the lands have been sold at auction. Up to the date of the entry and purchase, the title was in the United States; behind which date the courts of justice can uphold no deed of conveyance of the public lands, unless Congress has authorized assignments of occupant claims to be made; and as the acts of 1829 and 1836 awarded the preference of entry to the claimant who applied, and obtained, the favorable decision of the board of commissioners, no inquiry can be made into the dealings between Phelps and Guyard.

It is ordered that the judgment of the Supreme Court of Illinois be reversed, and that the cause be remanded, to be proceeded in according to this opinion.

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JACOB B. BROWN, JACOB NISSWANER, FONTAINE BECKHAM, JOHN  
O. UNSELD, AND GEORGE W. MOLER, PLAINTIFFS IN ERROR,  
v. BENJAMIN HUGER.

Where there had been an original entry for land made in the office of the Lord Proprietor of the Northern Neck of Virginia, a survey ordered upon that entry, and actually made and returned, and a patent adopting that survey, and founded thereupon, was issued by the Lord Proprietor to a grantee differing in name from the maker of the original entry, these circumstances constitute no ground for vacating or impeaching the legal title vested by the patent.

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*Brown et al. v. Huger.*

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The construction of the patent is the proper duty of the court, and not of the jury.

It is a universal rule, that wherever natural or permanent objects are embraced in the calls of a patent or survey, these have absolute control, and both course and distance must yield to their influence.

Hence, where a survey and patent call for a boundary to run down a river to its point of junction with another, thence up that other, the rivers are obviously intended as the boundaries, and courses must be disregarded, especially when it is manifest that one of them has been interpolated through error.

The authorities referred to.

THIS case was brought up by writ of error from the Circuit Court of the United States for the western district of Virginia.

The facts are stated in the opinion of the court.

It was argued by *Mr. Davis* and *Mr. Johnson* for the plaintiffs in error, and *Mr. Hull* and *Mr. Mason* for the defendant, on which side there was also a brief by *Mr. Black*, (Attorney General.)

The counsel for the plaintiffs in error made the following points :

1. That the court withdrew from the jury all questions touching the proof of the patent and the particular boundaries thereof, though the defendants' cases consisted in showing the boundaries in the only copy of the patent produced to be erroneous, and the patent itself appeared to have issued irregularly, and without a precedent survey for the patentee.

*Barclay et al. v. Howell's Lessee*, 6 Peters, 498, 508, 511.

2. That the court withdrew from the jury the question, whether the fourth point of the defendant's patent, being in fact *near* and not *on* the river, was, under all the circumstances of the locality and survey, on or only near the river; or, in a word, whether the point 18, or the point G, or a point on the river at the end of a line from either 18 or G, perpendicular to the river, were the true fourth point, and whether the river or the right lines mentioned in the patent were the true boundary?

*Barclay v. Howell*, 6 Peters, 498, 508, 511.

3. Though it be conceded that, in many cases, a call for a point

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*Brown et al. v. Huger.*

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*on a river*, and then up or down the river to another point *on* the river, will in law be a call for a line *with* the river, yet this case is not within the principle; but, calling for a point *near* the river, it must be a question of *fact* where the point is, and how far from the river, as the *law* cannot determine the length of what parties meant by *near*. It must be for the jury to say, whether *near* means *on* the river, or is only a general description of the locality of the point, which is itself the *real* point contemplated by the patent.

Connelly v. Bowie, 6 Harris and Johnson, 141.

Rogers v. Moore, 7 H. and J., 141.

Hammond v. Ridgely, 5 H. and J., 245, 255.

Howard v. Ingersoll., 13 Howard, 414, 418.

Mr. Mason made the following points:

*First Point.* The instruction asked for by the defendant assumes that the question of boundary at issue between the parties depends on the construction to be given to the calls of the senior patent, which, being a question of law, was properly referred to the court.

*Second Point.* The question of boundary was, whether, upon the evidence before the court, the boundaries set out in the senior patent were to be taken as the artificial lines there stated by course and distance, or the natural boundaries, the two rivers referred to in the patent.

The senior patent granted by Lord Fairfax to Robert Harper, and dated April 25th, 1751, corrected by the original survey of the 4th April, 1750, and having such correction established by other proofs, for the boundaries in question, calls as follows:

"Beginning at a sycamore standing on the edge of Shenandoah river, and extending thence down the said river south, fifty-five degrees east, forty-four poles, north, sixty-six degrees east, seventy-two poles, to a sycamore standing at the point; and thence up Potomack river north, forty-eight degrees west, two hundred poles, to a chestnut tree standing near Potomack, opposite to a small island."

The deed under which defendant claims from the devisee

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*Brown et al. v. Huger.*

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and heirs of the patentee to George Washington, President of the United States, dated June 15, 1796, calls the land conveyed the "Harper's Ferry tract," and describes the premises (as to the boundaries in question) as bounded "by the river Potomack on the outside, by the river Shenandoah on another side."

It is contended, on the part of defendant, that by the calls of this patent, in construction of law, (as well interpreted by the deed last referred to,) the two rivers, Potomac and Shenandoah, are to be taken as the boundaries in question.

If this be so, it is conclusive of the case.

On this point, the defendant cites—

New York: *Starr v. Child*, 20 Wendell, 156; *Trustees of the town of Kingston v. Louw*, 12 Johnson, 252.

Massachusetts: *Mayhew v. Norton*, 17 Pickering, 857.

North Carolina: *Hammond v. McGlaughan*, *Taylor's Rep.*, 186; *Rogers v. Mabe*, 4 Devereaux, 180; *Hartsfield v. Westbrook*, *Haywood's Rep.*, p. 297.

Kentucky: *Cockerell v. McQuin*, 4 Monroe's *Rep.*, 61; *Bruce v. Taylor*, 2 J. J. Marshall's *Rep.*, 160.

Ohio: *McCulloch v. Aton*, 2 Ohio *Supr. Court Rep.*, 808; *Newsom v. Pryor*, 7 Wheaton, 7 and 10.

Mr. Justice DANIEL delivered the opinion of the court.

This was an action of ejectment instituted by the plaintiffs in error against the defendant, in the Circuit Court of the county of Jefferson, in the State of Virginia.

The *locus in quo* being held and occupied by the defendant as an officer of the United States, and in virtue of their right and authority, the suit was, under the act of Congress of 1789, removed, upon petition, to the Circuit Court of the United States for the western district of Virginia, within which district the property in dispute is situated. The claim of the plaintiffs is founded on a patent from the Lieutenant Governor of Virginia, granted to Jacob Brown and Jacob Nisswaner, dated July 29, 1851, and granted in virtue of a land office Treasury warrant for the location of waste and unappropriated lands. This patent, according to the various courses and dis-

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*Brown et al. v. Huger.*

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tances therein set forth, purports to grant the quantity of thirty-nine acres and two roods. Beckham, Unseld, and Moler, three of the plaintiffs, derived their title directly from the patentees above named, as was shown by conveyances from the latter, which were read in evidence. The plaintiffs also introduced a survey plot and report, made by A. Trotter, surveyor, in pursuance of an order of court in this cause; and relied upon the same, with other evidence, to show that the land granted by the patent of 1851 was correctly laid down and described in the survey, and that the defendant was in the possession of the land claimed at the commencement of the plaintiff's action.

The defendant, holding the premises as the agent and under the authority of the United States, defended the right to the possession, as held by him, upon the following proofs, being certified copies from the records of the land office of the State of Virginia, by S. A. Parker, the register of that office. 1st. An entry in the office of the Lord Proprietor of the Northern Neck of the State of Virginia, (within which portion of the State the land in contest is situated,) in the following words, viz: "1750, April 4. Surveyed. James Nickols, of Frederick county, Virginia, entered about two hundred acres of waste and ungranted land at the mouth of the Shanandoah river." And an order from Lord Fairfax to Guy Broadwater, in the words and figures following, viz:

*"To Mr. Guy Broadwater:*

"Whereas James Nickols hath informed that there are about two hundred acres of waste and ungranted land where he now lives, and desiring a warrant to survey ye same, in order to obtain a deed, being ready to pay ye composition and office charges: These are therefore to empower you, ye said ———, to survey ye said waste land, provided this be ye first warrant that hath issued for ye land; and you are to make a just and accurate survey thereof, describing the course and distance per pole; also ye cuttings and boundings of the several persons' lands adjoining; and where you cannot join to any known lines, you are to make ye breadth of ye tract to bear at least

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*Brown et al. v. Huger.*

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ye proportion of one-third of ye length, as ye law of Virginia directs; you are also to insert ye name of ye pilote and chain carryers made use of and employed; a plat of which said survey, with this warrant, you are to give into this office any time before —— day of ——, next ensuing. Given under my hand and seal of ye proprietor's office, this —— day of ——, in ye twenty —— year of his majesty King George ye second reign.  
**FAIRFAX."**

2d. And a plat and certificate of survey by said Broadwater, in the words and figures following, viz:

"By virtue of a warrant from ye proprietor's office, dated the 4th of April, 1750, granted to James Nickols one certain parcel or tract of land situated and lying in Frederick county: Beginning at A, a *sickamore* standing upon ye edge of Shenandoah, extending down ye said river S. 55 E. 44 poles to B; thence N. 66 E. 72 poles to C, a *sickamore* standing upon ye pitch of ye point of Shenandoah; thence up Potomac N. 48 W. 200 poles to D, a chestnutt tree standing near Potomac river, side oppositt to a small isleland; thence west 105 poles to E, a white oak; thence S. 140 poles to F, a red oak; thence east 150 poles to ye beginning, containing 125 acres, surveyed by me.

"GUY BROADWATER.

"JOSEPH CANTNELL, }  
 "JOSEPH NICKOLS, } *Chain-carriers."*

Endorsed: "Deed issued 25th April, 1751."

An official certificate from S. H. Parker, register of the Virginia land office, dated Richmond, June 27th, 1854, in the following words:

"I, S. H. Parker, register of the land office of Virginia, do hereby certify, that it does not appear that any grant has been issued on the survey made by James Nickols for 125 acres of land in Frederick county to any person except Robert Harper, to whom a grant issued on the 25th day of April, 1751, which date agrees with the date on Nickols' survey. And I further certify that I can find no *survey* of Robert Harper for 125 acres on file in this office "



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*Brown et al. v. Huger.*

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3d. A grant from the Lord Proprietor of the Northern Neck, in the following words:

“The Right Honorable Thomas Lord Fairfax, Baron of Cameron, in that part of Great Britain called Scotland, proprietor of the Northern Neck of Virginia:

“*To all to whom this present writing shall come, sends greeting:*

“Know ye, that for good causes, for and in consideration of the composition to me paid, and for the annual rent hereafter received, I have given, granted, and confirmed, and by these presents, for me, my heirs and assigns, do give, grant, and confirm unto Robert Harper, of the county of Frederick, a certain tract of waste and ungranted lands in the said county, at the mouth of Shanandoah river, and is bounded as by a survey thereof made by Guy Broadwater, as followeth: Beginning at a sycamore standing on the edge of Shanandoah river, and extending thence down the said river N. 48° W., 200 N. 66 E., seventy-two poles to a sycamore standing at the point, and thence up Potomack river N. 48° W., two hundred poles to a chestnut tree standing near Potomack, opposite to a small island; thence W. one hundred and five poles to a white oak; thence south one hundred and forty poles to a red oak; thence east one hundred and fifty poles to the beginning, containing one hundred and twenty-five acres, together with all rights, members, and appurtenances thereunto belonging, royal mines excepted, and a full third part of all lead, copper, tin, coals, iron mines, and iron ore, that shall be found thereon:

“To have and to hold the said one hundred and twenty-five acres of land, together with all rights, profits, and benefits to the same belonging, or in anywise appertaining, except before excepted to him, the said Robert Harper, his heirs and assigns, forever.

“Given at my office in the county of Fairfax, within my said proprietary, under my hand and seal, dated this 25th day of April, in the 24th year of our sovereign lord, George the Second by the Grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c., A. D. 1751.

(Signed)

“FAIRFAX.”

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*Brown et al. v. Huger.*

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4th. The defendant offered in evidence the last will of Robert Harper, deceased, the grantee of the Lord Proprietor, with proof of the probate and recording of that last will in the court of Berkley county, on the 13th of October, 1782. By the first clause of the will disposing of his property, the testator devised to his nephew, Robert Griffith, "one moiety or half of his ferry survey, to form a straight direct line to run along the two fences on the east side, or that side next to the ferry, the one fence lying on the north, and the other on the south side of the road leading from the ferry to Winchester; the sides of the above-mentioned fences to be a director, or to show where each end of the division line shall terminate. The end of the line leading to the Potomac to terminate as soon as it strikes that river; the end leading to Shenandoah to keep a straight line till it likewise strikes said river, and to contain and include the island opposite where the said line strikes; then to run in my (said Harper's) line, adjoining Sample's line, to continue with said line and to include ninety acres of a new survey; thence to continue its course till where the dividing line shall strike the Potomac river, including therewith the saw-mill and grist-mill of the testator." By the survey and report of Trotter, this line, denominated Sample's line, is one of the courses delineated upon the survey as a boundary to a tract of land conveyed by one Gershom Keys to John Sample, on the 9th of June, 1763, and this line is its southern termination, runs to the margin of the Shenandoah river, and near to Harper's house, as delineated on the plat, and to the grist and saw-mill situated upon that river.

By the next disposition in his will, the testator devised to his niece, Sarah Harper, his ferry and ferry-house on Potomac river, and all the remainder of his ferry survey, not before devised to Robert Griffith, and all his estate in and right and title to the Maryland shore of the said ferry, and to ten acres of land upon what is called the Big Island in the Potomac river adjoining the ferry aforesaid.

The defendant also gave in evidence the plat and report of survey made as aforesaid in this case by Trotter, and evidence tending to prove that the beginning corner of Harper's patent

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*Brown et al. v. Huger.*

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was actually on the bank of the Shenandoah river, as at A on the map; and that the third corner of said patent was at or near the junction of the Shenandoah and Potomac rivers; and that the next corner of the patent, at the distance of two hundred poles up the Potomac river, was near the bank of said river at the point G or 18 on the plat; and that the general course of the said two rivers was as laid down in the said plat in relation to the four said first lines of Harper's patent. Upon a comparison of the survey made by Broadwater by order of the Lord Proprietor with the copy of the patent from the land office, there will be perceived this disagreement between these two documents with regard to the first call in the location of the land. In the survey as well as in the patent, the beginning is stated to be at a sycamore tree *standing on the edge of Shenandoah river*, and extending thence down the river to a sycamore standing, says the patent, *at the point*, and according to the survey, *at the pitch of the point* of Shenandoah, thence up the Potomac, &c. But whilst the first course in the survey in approaching the point or the junction of the two rivers is S. E., the same course is represented in the grant as running N. W. This is a manifest error on the face of the grant, as the geographical knowledge of every one compels him to know, that the rivers Potomac and Shenandoah in approaching each other run in a south and east direction; and therefore, if this course in the grant ran northwest from the point of beginning, it would diverge more and more at every step from the Potomac, and could never reach the latter river. To correct this manifest error, if indeed proof could be necessary in aid of the geography of the country, or of the sensible meaning of the patent itself, the defendant offered evidence to show that the original parchment patent had been lost; and further proof to show that this original parchment patent was in the years 1825 and 1827 in possession of Mrs. Catharine Wager, widow of John Wager, jun., deceased, who was son of John Wager, sen., who was the husband of Sarah Harper, the devisee of Robert Harper, the original patentee. He further offered proof that the courses and distances had been copied from said original in the years 1825 and 1827, respectively, by the deputy surveyor

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*Brown et al. v. Huger.*

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of Jefferson county, where the lands lie, for the purpose of survey, and were used by him in a survey of the tract patented as aforesaid to Robert Harper, between the Wagers, who claimed under the said Robert Harper, and the United States; and offered further proof that the said courses and distances had in 1816 or 1818 been copied from the same original patent by John Peacher, a witness in this cause, then the owner of land binding on the lines of Harper's patent, a copy of which courses and distances is as follows, viz: "Beginning at a sycamore standing on the edge of the Shenandoah river, and extending thence down the said river S. 55 E. 44 poles, N. 66 E. 72 poles to a sycamore standing on the point; and thence up Potomac river N. 48 W. 200 poles to a chestnut tree standing near the Potomac, opposite a small island; thence W. 105 poles to a white oak, S. 140 poles to a red oak; thence E. 150 poles to the beginning."

The defendant then deduced title through conveyances from the devisees of Robert Harper to George Washington, President of the United States, and his successors, on behalf of the United States. One of those conveyances, bearing date on the 15th of June, 1796, from John Wager the elder, the husband, and John Wager, Margaret Wager, and Mary Wager, children of Sarah Harper, describing the land conveyed as "all that piece of land situated in the county of Berkley commonly known as the Harper's Ferry land, which was devised by the will of Robert Harper, bearing date on or about the 26th day of September, 1782, to his niece, Sarah Harper, and is bounded by the river Potomac on the outside, by the river Shenandoah on the other side, and by the line dividing it from the tract or parcel of land devised by the said Robert Harper to Robert Griffith on the other side." And in the conveyance from Robert Griffith, the devisee of Harper, dated on the 9th day of January, 1797, to Thomas Rutherford and others, the grantors of another portion of this land to George Washington for the United States, it is recited, "that whereas Robert Harper, late of the county of Berkley, and Commonwealth of Virginia, was in his lifetime seized in fee of and in one certain tract of land situate, lying and being at the confluence of the Potomac

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*Brown et al. v. Huger.*

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and Shenandoah rivers, in the county of Berkley, containing one hundred and twenty-five acres, for which he obtained a deed from the proprietor, &c. ; and, being so seized, did by his last will devise unto his nephew, Robert Griffith the elder, one equal moiety or half of the above-described one hundred and twenty-five acres of land, comprehending a saw-mill thereon, and an island in the Shenandoah opposite thereto." The defendant further proved that the United States had, between the years 1796 and 1800, erected and established on the land in controversy the necessary buildings for an armory and arsenal for the manufacture and repair of arms, and had held and occupied and used, for the purposes aforesaid, the land and buildings, from the years above mentioned to the present time. That the defendant is an officer in the military service of the United States, attached to the Ordnance department, and as such was in charge and in possession of the land in controversy, with the buildings thereon, and the armory of the United States at Harper's Ferry, under an order from the Ordnance department; and that the lands aforesaid had been in the like charge of his predecessors, under orders and appointments from the Ordnance Office or War Department of the United States, from May, 1829, to the period when the defendant took possession; and that, prior to the year 1829, as far back as the year 1800, the said lands and buildings were in like charge of other persons in the service of the United States at said armory.

Such being the state of the evidence, the defendant moved the court to give the jury the following instructions, viz: "That the patent to Robert Harper, having its beginning corner on the Shenandoah river, and calling to extend thence down the river, by course and distance, to the point where it appears, from the survey made in this cause, the river Shenandoah unites with the Potomac; and from that point up the river Potomac, by course and distance, to a corner near the last-named river, opposite to a small island. In construction of law, the two rivers are thereby made the boundaries of said patent, from said beginning on the Shenandoah to the last-named corner on the Potomac; and if the jury believe, from

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*Brown et al. v. Huger.*

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the evidence, that the lands claimed by the plaintiffs lay along the rivers Shenandoah and Potomac, within the lines of the patent to Robert Harper, extended as aforesaid to the two rivers, they must find for the defendant—the patent under which the plaintiff claims being junior to that of Harper's, under which the defendant claims—unless the plaintiffs should establish a title to the lands in controversy other than through then said patent."

On the same state of the evidence, the plaintiffs also moved the court to instruct the jury as follows: "That the question as to how the survey, on which this patent of Robert Harper was issued, was actually run, is in this case a question of fact for the jury; and if the jury believe that the line from the sycamore, at the point of confluence of the Shenandoah and Potomac rivers, to the chestnut tree, was actually run a straight line, then that straight line is the boundary of Robert Harper's patent. But the court gave the instruction asked for by the defendant, and refused to give the instruction asked for by the plaintiffs; to which opinions and action of the court—giving the defendant's instruction, and refusing the plaintiffs' instruction—the plaintiffs by counsel except, and their exceptions are here sealed by the court.

"JOHN W. BROCKENBROUGH. [SEAL.]"

The correctness or incorrectness of the decision of the Circuit Court, in granting the prayer of the defendant, and in refusing that presented by the plaintiff, is the subject of inquiry in this case.

A striking peculiarity distinguishing this case is perceived in the fact that it discloses an effort, by means obtained at a cost comparatively nominal, to disturb and to destroy a possession of more than half a century in duration; a possession connected with public interests of primary magnitude; a possession acquired in return for a full and fair equivalent given, and of a notoriety as extensive as the limits of the nation.

Although the immunity created by lapse of time may not have been directly interposed for its protection, yet such an immunity as necessarily disclosed by the evidence adduced on

both sides of this controversy, certainly does not commend the pretensions of the plaintiffs upon considerations of either justice or policy. But beyond such general considerations, though in strict accordance with them, let us inquire whether, upon principles established and mandatory, and inseparable from the maintenance of social order and quiet, and of private right, this attempt of the plaintiffs should not be repelled?

The exceptions taken by the plaintiffs in error to the instructions of the Circuit Court, and alleged as causes of error here, are stated as follows:

1st. That the court withdrew from the jury all questions touching the proof of the patent and the particular boundaries thereof, though the defendant's case consisted in showing the boundaries in the only copy of the patent produced to be erroneous, and the patent to have issued irregularly, and without a precedent survey for the patentee.

2d. That the court withdrew from the jury the question whether the 4th point of the survey of the defendant's patent, being in fact *near* and not *on* the river, was, under all the circumstances of the survey, *ON* or only *NEAR* the river; or whether the river or the right lines mentioned in the patent were the true boundary?

In examining this first objection, and the foundation on which it is made, it appears that the original entry for the land in controversy was in the name of James Nickols; that the order of survey from the Lord Proprietor to the surveyor, Broadwater, was for a survey upon that entry, and that the survey made and returned by Broadwater was upon that entry; but it equally appears that the patent issued by the Lord Proprietor refers to and adopts the survey of Broadwater with respect to its own date, the date of the warrant and the quantity of the land surveyed, and grants the land so surveyed to Robert Harper. From the records of the land office of Virginia, comprising the records of the proprietary, it is shown that on the survey made in the name of James Nickols for 125 acres of land in Frederick county, a patent was granted by the Lord Proprietor to Robert Harper on the 25th day of April, 1751, which date corresponds with that endorsed upon Nickols's

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*Brown et al. v. Huger.*

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survey. It is not therefore perceived upon what ground the regularity of the proceedings anterior to the patent to Harper, or the authority to issue it, can be assailed. It does not appear that any exception to either was taken in the court below, and therefore, if at any time available, it is not allowable here.

With regard to the second part of this objection, that which claims for the jury the construction of the patent, we remark that the patent itself must be taken as evidence of its meaning; that, like other written instruments, it must be interpreted as a whole, its various provisions be taken as far as practicable in connection with each other, and the legal deductions drawn therefrom must be conformable with the scope and purpose of the entire document. This construction and these deductions we hold to be within the exclusive province of the court. The patent itself could not be altered by evidence aliunde, but proof as to the existence and character of the objects or subjects to which it was applicable was regular, and even necessary to give it effect.

In ascertaining the boundaries of surveys or patents, the universal rule is this: that wherever natural or permanent objects are embraced in the calls of either, these have absolute control, and both course and distance must yield to their influence.

Upon recurrence to the survey by Broadwater, from the beginning at A, a sycamore standing on the edge of Shenandoah, (a point admitted by all the parties to be the beginning in Harper's Ferry tract,) the survey calls for a course extending *down* the said river S. 55 E. 44 poles to B; thence N. 66 E. 72 poles to C, a sycamore standing on the pitch of the point of Shenandoah; thence up Potomac N. 48 W. 200 poles to D, a chestnut tree standing near Potomac river *side*, opposite a small island; thence W. 105 poles to E, a white oak; thence S. 140 poles to F, a red oak; thence E. 150 poles to the beginning. The patent from the Lord Proprietor, granting the land to Harper *at the mouth of the Shenandoah river*, professes to make the grant, and to give the boundaries of the land and the quantity thereof according to the survey by Broadwater, and commences the description, as taken from that survey, as follows: Beginning at a sycamore standing on the edge of Shenandoah river,



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*Brown et al. v. Huger.*

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and extending thence *down* the said river. At this point in the description are interposed the letters and figures (N. 48° W. 200 N.) It is evident that these letters and figures have been interpolated in this place by an error, perhaps in recording the patent. This seems to follow from the fact that these letters and figures, as thus placed, have no sensible meaning. N. 48° W. 200 N., mean nothing; they point to no object, and neither are they connected with any distance. Immediately following these letters and figures are the several descriptive calls of the patent, corresponding with the courses and distances and objects contained in the survey which it had referred to and adopted. The fact of this interpolation is also shown by the circumstance that farther on in the description, both in the survey and patent, of the courses and distances bordering on the Potomac, there is given, commencing at the point or confluence of the two rivers, the course of N. 48° W. 200 poles to a chestnut tree standing on the Potomac opposite a small island, which part of the description was doubtless wrested from its proper position, and transferred to another in which it could convey no intelligible meaning, and from which it should be expunged as absurd and of no effect. It is proper here to observe that neither in the survey nor the patent for the Harper's Ferry tract is there a course, or a distance, or a station, which is inconsistent with or in opposition to a river boundary; but on either side of that tract facing the river, a riparian or river boundary is obviously intended. Thus at the Shenandoah, the commencing point is at a tree on the edge of the river; thence down the river to a point of the Shenandoah, (meaning the river, of course, as there was no other object bearing that name;) at this point is the confluence of the two rivers. Thence the course is up the Potomac N. 200 poles to a chestnut tree standing, in the language of the survey, "*near Potomac river side,*" and in that of the patent, "*near Potomac.*"

The question then propounded by the prayers to the court below was a question of law arising upon the construction of the two patents—the one from the State of Virginia in 1851, the other from Lord Fairfax in 1750.

If, as is contended by the defendant, the calls in the patent

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*Brown et al. v. Huger.*

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to Robert Harper, and in the survey on which it purports to be founded, extended to the rivers Shenandoah and Potomac, such a construction must be conclusive of this controversy; it leaves no question to be determined by the jury as to the running of any artificial line; it fully sustains the decision of the Circuit Court upon the prayers respectively offered by the parties.

The citation from the treatise by Angell on water-courses fully declares the rule to be, that where a line is described as running in a certain direction to a river, and thence up or down with the river, those words imply that the line is to follow the river according to its meanderings and turnings, and in water-courses not navigable must be "*ad medium filum aquae.*" Upon a question of boundary in the case of *Jackson v. Low*, in the 12th of Johnson's Reports, 255, in ejectment, the court, in construing a provision in a deed in these words: "leading to the creek, and *thence up the same to the southwest corner of a lot,*" &c., say, "there can be no doubt but this lot must follow the creek upon one of its banks or through the middle. This description can never be satisfied by a straight line. The terms 'up the same' necessarily imply that it is to follow the creek according to its windings and turnings, and that must be the middle or centre of it."

In the case of *Mayhew v. Norton*, a grantor had conveyed land to be bounded by the harbor of Edgartown. The Supreme Court of Massachusetts decided that the flats in front of the lots conveyed passed by the deeds, because they were in the harbor, although the quantity of land conveyed and the length of the lines would have been satisfied by applying them to the upland alone. In the case of *Cockerell v. McGuire*, 4th T. B., Monroe's Rep., 62, the Circuit Court, in ejectment, had instructed the jury upon a question of boundary that the following calls in the patent: "thence from the fourth course down the river these several courses should be construed by the jury as a call to run down the river bounding thereon, with its meanders," &c. The Supreme Court, to whom this cause was carried by writ of error, say: "In cases of boundary which depend upon the swearing of witnesses, it would no doubt be incompe-

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*Brown et al. v. Huger.*

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tent for the court, by any sort of instructions that might be given, to withdraw from the jury a decision upon the weight of the testimony and the facts which the testimony conduces to establish." But the case under consideration is not one of that sort. The question for our consideration involves no inquiry into the testimony of witnesses; but, on the contrary, in the absence of all parol evidence as to marked lines, presents for the determination of the court the construction of the calls for boundary mentioned in the patent, and surely none will pretend that the legal construction of a patent is not a matter proper for the decision of a court. If in the first branch of the instructions the court was correct in supposing that the call in the patent to run down the river these several courses, &c., should be construed as a call to run with the river, it was unquestionably correct to instruct the jury that the north fork between the fourth corner of the patent and the beginning formed part of the boundary; and that in the first branch of the instruction the court gave a correct construction of the calls of the patent, we apprehend there can be no ground for reasonable doubt.

In the case of *Newsom v. Pryor*, (7 Wheaton, 10,) it is laid down by this court as a rule for the construction of surveys and grants, that the most material and certain calls must control those that are less material and certain. A call for a natural object, as a river, a known stream, or a spring, or even a marked tree, shall control both course and distance.

The recent decision of *French v. Bankhead*, in the 11th of Grettan, p. 186, decided by the Supreme Court of Virginia, within which State are the lands embraced in this controversy, has an important bearing upon the cause, as it shows the interpretation, by the highest tribunal of that State, of grants made by her with reference to lines running to water-courses, and of the effect of water-courses upon such boundaries. In the case just mentioned it was ruled that the water boundary, though run by course and distance, would be controlled by the actual course of the shore, and would pass the right to the property to low-water mark.

Upon the reasoning hereinbefore declared, and upon the authorities cited, to which others might be added, we are of the

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*Kendall et al. v. Winsor.*

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opinion that the patent from the State of Virginia, of the date of July 29, 1851, was unwarranted and illegal, as having embraced within it lands which were not waste and unappropriated, but which had been previously granted by competent authority, and long in the possession of the patentee and those claiming title under him. We are further of the opinion that the construction of the Circuit Court in relation to the character and effect of the elder and junior grants of the land in controversy was correct, and that its decision should therefore be, as it is hereby, affirmed, with costs.

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GEORGE KENDALL, LEANDER M. WARE, AND GEORGE L. JENCKES,  
PLAINTIFFS IN ERROR, v. JOSEPH S. WINSOR.

The ultimate object of the patent laws being to benefit the public by the use of the invention after the temporary monopoly shall have expired, one who conceals his invention, and uses it for his own profit, is not entitled to favor if another person should find out and use the invention.

But this does not include the case of an inventor who forbears to apply for a patent until he has perfected his invention or tested its value by experiments.

Whether or not an inventor intended to do this, or negligently to postpone his claims to a patent, as, for instance, by acquiescing with full knowledge in the use of his invention by others, are questions which ought properly to be left to the jury.

If a person should surreptitiously obtain knowledge of the invention, and use it, he would have no right to continue to use it after the inventor should have obtained a patent.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Rhode Island.

The facts in the case, the instructions asked for and refused upon the trial in the Circuit Court, and also those given to the jury by the court, are all set forth in the opinion of the court. Under these instructions, the jury found a verdict for the plaintiff, and assessed his damages in the sum of two thousand dollars.

It was argued by *Mr. Jenckes* for the plaintiffs in error, and by *Mr. Keller* for the defendant.

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*Kendall et al. v. Winsor.*

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The points made by the counsel on each side can be readily inferred from a perusal of the instructions asked for on behalf of the defendants in the Circuit Court, and of those given, which latter were sustained in the argument in this court. All of these instructions are set forth in the following opinion.

Mr. Justice DANIEL delivered the opinion of the court.

This was an action on the case in the Circuit Court of the United States, instituted by the defendant in error against the plaintiffs, for the recovery of damages for an alleged infringement by the latter of the rights of the former as a patentee. No question was raised upon the pleadings or the evidence in this case as to the originality or novelty of the invention patented, nor with respect to the identity of that invention with the machine complained of as an infringement of the rights of the patentee, nor as to the use of that machine. These several facts were conceded, or at any rate were not controverted, between the parties to this suit.

Under the plea of *not guilty*, the defendant in the Circuit Court gave notice of the following defences to be made by him:

1. A license from the plaintiff to use his invention.
2. A right to use that invention in virtue of the seventh section of the act of Congress of the 3d of March, 1839, which section provides, "That every person or corporation who has or shall have purchased or constructed any newly-invented machine, manufacture, or composition of matter, prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter, so made or purchased, without liability therefor to the inventor or any other person interested in such invention."

To the relevancy and effect of the evidence adduced with reference to the two defences thus notified, and to the questions of law arising upon the issues made by those defences, this controversy is properly limited.

Upon the trial in the Circuit Court, in support of this defence, evidence was introduced tending to show that the plain-

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*Kendall et al. v. Winsor.*

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tiff constructed a machine in substantial conformity with his specification as early as 1846, and that in 1849 he had several such machines in operation, on which he made harness to supply all such orders as he could obtain; that he continued to run these machines until he obtained his letters patent; that he repeatedly declared to different persons that the machine was so complicated that he preferred not to take a patent, but to rely on the difficulty of imitating the machine, and the secrecy in which he kept it. And the defendants also gave evidence tending to prove that the first of their machines was completed in the autumn of 1853, and the residue in the autumn of 1854; and that, in the course of that fall, the plaintiff had knowledge that the defendants had built, or were building, one or more machines like his invention, and did not interpose to prevent them.

The plaintiff gave evidence tending to prove that the first machine built by him was never completed so as to operate; that his second machine was only partially successful, and improvements were made upon it; that in 1849 he began four others, and completed them in that year, and made harness on them, which he sold when he could get orders; that they were subject to some practical difficulties, particularly as it respected the method of marking the harness, and the liability of the bobbin to get out of the clutch; that he was employed in devising means to remedy these defects, and did remedy them; that he also endeavored to simplify the machine by using only one ram-shaft; that he constantly intended to take letters patent when he should have perfected the machine; that he applied to Mr. Keller for this purpose in February, 1853, but the model and specifications were not sent to Washington till November, 1854; that he kept the machines from the view of the public, allowed none of the hands employed in the mill to introduce persons to view them, and that the hands pledged themselves not to divulge the invention; that among the hands employed by the plaintiff was one Kendall Aldridge, who left the plaintiff's employment in the autumn of 1852, and entered into an arrangement with the defendants to copy the plaintiff's machine for them, and did so; and that it was by Aldridge, and

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*Kendall et al. v. Winsor.*

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under his superintendence, and by means of the knowledge which he had gained while in the plaintiff's employment, under a pledge of secrecy, that the defendant's machines were built and put in operation; and that one of the defendants had procured drawings of the plaintiff's machine, and has taken out letters patent for it in England.

Each party controverted the facts thus sought to be proved by the other.

The defendant's counsel prayed the court to instruct the jury as follows:

1. That it is the duty of an inventor, if he would secure the protection of the patent laws, to apply for a patent as soon as his machine (if he has invented a machine) is in practical working order, so as to work regularly every day in the business for which it was designed; and if he does not so apply, he has no remedy against any persons who possess themselves of the invention, with his knowledge and without his notification to desist, or of his claims as an inventor before he applies for his patent.

2. That a machine can no longer be considered as an experiment, or the subject of experiment, when it is worked regularly in the course of business, and produces a satisfactory fabric, in quantities sufficient to supply the entire demand for the article.

3. That in order to justify the delay of the plaintiff in applying for a patent after his machine was in practical working order, on the ground of the desire to improve and perfect it, the plaintiff must show some defect in construction, or difficulty in the operation or mode of operation, which he desired and expected to remove by further thought and study; and if no such thing is shown, then the machine must be held to have been completed and finished, in the sense of the patent law, at the time it was put in regular working use and operation.

4. That under the 7th section of the act of 1839, entitled, &c., if the jury are satisfied that the machines for the use of which the defendants are sued were constructed and put in operation before the plaintiff applied for his patent, then the defendants possessed the right to use, and vend to others to be

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*Kendall et al. v. Winsor*

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used, the specific machines made or purchased by them, without liability therefor to the plaintiff; and the jury are to inquire and find only the fact of such construction before the date of the plaintiff's application, in order to render a verdict for the defendants.

5. That under said section of said act, if the machines used by the defendants were purchased or constructed by them before the application of the plaintiff for his patent, with the knowledge of the plaintiff, then they must be held to possess the right to use, and vend to others to be used, the machines so purchased or constructed; and the jury are to inquire into and find only the fact of such purchase or construction, and that the plaintiff had knowledge of the same, in order to render a verdict for the defendants.

6. That under said section of said act, if the machines used by the defendants were purchased or constructed by them before the application of the plaintiff for his patent, without the knowledge of the plaintiff, and without his notifying the defendants of his claim as the inventor, and requiring them to desist from such construction, then they must be held to possess the right to use, and vend to others to use, the machines so purchased or constructed; and the jury are to inquire only into and find the fact of such purchase or construction, and that the plaintiff had knowledge of the same, and did not notify the defendant to desist from such purchase or construction of his claims as inventor, in order to render a verdict for the defendants.

The court set aside all those prayers for instructions, and did instruct the jury as follows:

1. That if Aldridge, under a pledge of secrecy, obtained knowledge of the plaintiff's machine—and he had not abandoned it to the public—and thereupon, at the instigation of the defendants, and with the knowledge, on their part, of the surreptitiousness of his acts, constructed machines for the defendants, they would not have the right to continue to use the same after the date of the plaintiff's letters patent. *But if the defendants had these machines constructed before the plaintiff's application for his letters patent, under the belief authorized by him that he*



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*Kendall et al. v. Winsor*

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*consented and allowed them so to do*, then they might lawfully continue to use the same after the date of the plaintiff's letters patent, and the plaintiff could not recover in this action. And that if the jury should find that the plaintiff's declaration and conduct were such as to justify the defendants in believing he did not intend to take letters patent, but to rely on the difficulty of imitating his machine, and the means he took to keep it secret, this would be a defence to the action. And they were further instructed, that to constitute such an abandonment to the public as would destroy the plaintiff's right to take a patent, in a case where it did not appear any sale of the thing patented had been made, and there was no open public exhibition of the machine, the jury must find that he intended to give up and relinquish his right to take letters patent. But if the plaintiff did intend not to take a patent, and manifested that intent by his declarations or conduct, and thereupon it was copied by the defendant, and so went into use, the plaintiff could not afterwards take a valid patent.

To which refusal to give the instructions prayed for, as well as to the instructions given, the defendants, by their counsel, excepted before the jury retired from the bar; and, as the matter thereof did not appear of record, prayed the court to allow and seal this bill of exceptions; which, being found correct, has been allowed and sealed accordingly by the presiding judge.

B. R. CURTIS,

[L. S.]

*Justice Sup. Ct. U. S.*

The first ground of defence assumed under the notice from the defendant in the court below—viz: a license from the patentee—may at once be disposed of by the remark that no evidence was offered on the trial, bearing directly or remotely upon the fact of an actual license from the patentee, either to the defendant or to any person whomsoever. The defence then must depend exclusively upon the proper construction of the section of the law above cited, and the application of that section to the conduct of the parties, as shown by the bill of exceptions.

It is undeniably true, that the limited and temporary mo-

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*Kendall et al. v. Winsor*

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monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly. This was at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects. The true policy and ends of the patent laws enacted under this Government are disclosed in that article of the Constitution, the source of all these laws, viz: "to promote the progress of science and the useful arts," contemplating and necessarily implying their extension, and increasing adaptation to the uses of society. (Vide Constitution of the United States, art. I, sec. 8, clause 9.) By correct induction from these truths, it follows, that the inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts of Congress. He does not promote, and, if aided in his design, would impede, the progress of science and the useful arts. And with a very bad grace could he appeal for favor or protection to that society which, if he had not injured, he certainly had neither benefited nor intended to benefit. Hence, if, during such a concealment, an invention similar to or identical with his own should be made and patented, or brought into use without a patent, the latter could not be inhibited nor restricted, upon proof of its identity with a machine previously invented and withheld and concealed by the inventor from the public. The rights and interests, whether of the public or of individuals, can never be made to yield to schemes of selfishness or cupidity; moreover, that which is once given to or is invested in the public, cannot be recalled nor taken from them.

But the relation borne to the public by inventors, and the obligations they are bound to fulfil in order to secure from the former protection, and the right to remuneration, by no means forbid a delay requisite for completing an invention, or for a test of its value or success by a series of sufficient and practical experiments; nor do they forbid a discreet and rea-

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*Kendall et al. v. Winsor.*

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sonable forbearance to proclaim the theory or operation of a discovery during its progress to completion, and preceding an application for protection in that discovery. The former may be highly advantageous, as tending to the perfecting the invention; the latter may be indispensable, in order to prevent a piracy of the rights of the true inventor.

It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language—such, for instance, as an acquiescence with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a wilful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others. Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these. But, whilst inventors are bound to diligence and fairness in their dealings with the public, with reference to their discoveries on the other hand, they are by obligations equally strong entitled to protection against frauds or wrongs practiced to pirate from them the results of thought and labor, in which nearly a lifetime may have been exhausted; the fruits of more than the *viginti annorum lucubrationes*, which fruits the public are ultimately to gather. The shield of this protection has been constantly interposed between the inventor and fraudulent spoliator by the courts in England, and most signally and effectually has this been done by this court, as is seen in the cases of *Pennock & Sellers v. Dialogue*, (2 Peters, 1,) and of *Shaw v. Cooper*, (7 Peters, 292.) These may be regarded as leading cases upon the questions of the abrogation or relinquishment of patent privileges as resulting from avowed intention, from abandonment or neglect, or from use known and assented to.

Thus, in the former case, the court, on page 18, interpreting the phrase, "*not known or used before the application for a patent*,

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*Kendall et al. v. Winsor.*

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make the inquiry, 'what is the true meaning of the words *not known or used*,' &c. They cannot mean that the thing invented was not known or used before the application by the inventor himself; for that would be to prevent the only means of his obtaining a patent. The USE as well as the KNOWLEDGE of his invention must be indisputable, to enable him to ascertain its competency to the end proposed, as well as to perfect its component parts. The words, then, to have any rational interpretation, must mean, *not known or used by others* before the application. But how known or used? If it were necessary, as it well might be, to employ others to assist in the original structure or use by the inventor himself, or if before his application his invention *should be pirated by another, or used without his consent*, it can scarcely be supposed that the Legislature had within its contemplation such knowledge or use." Further on in the same case, page 19, the court say, "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention, if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying on his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what would be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries." In *Shaw v. Cooper*, (7 Peters,) this court, on page 319, in strict coincidence with the decision in 2 Peters, say, "The knowledge or use spoken of in the statute could have referred to the public only, and cannot be applied to the inventor himself; he must necessarily have a perfect knowledge of the thing invented and its use, before he can describe it, as by law he is required to do preparatory to the emanation of a patent. But there may be cases in which the knowledge of the invention *may be surreptitiously obtained*, and communicated to the public, that do not affect the right of the inventor. Under such circumstances,

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*Thomas v. Lawson et al.*

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no presumption can arise in favor of an abandonment of the right to the inventor to the public, though an acquiescence on his part will lay the foundation for such a presumption."

The real interest of an inventor with respect to an assertion or surrender of his rights under the Constitution and laws of the United States, whether it be sought in his declarations or acts, or in forbearance or neglect to speak or act, is an inquiry or conclusion of *fact*, and peculiarly within the province of the jury, guided by legal evidence submitted to them at the trial.

Recurring now to the instruction from the judge at circuit in this case, we consider that instruction to be in strict conformity with the principles hereinbefore propounded, and with the doctrines of this court, as declared in the cases of *Pennock v. Dialogue* and *Shaw v. Cooper*. That instruction diminishes or excludes no proper ground upon which the conduct and intent of the plaintiff below, as evinced either by declarations or acts, or by omission to speak or act, and on which also the justice and integrity of the conduct of the defendants were to be examined and determined. It submitted the conduct and intentions of both plaintiff and defendants to the jury, as questions of *fact* to be decided by them, guided simply by such rules of law as had been settled with reference to issues like the one before them; and upon those questions of fact the jury have responded in favor of the plaintiff below, the defendant in error. We think that the rejection by the court of the prayers offered by the defendants at the trial was warranted by the character of those prayers, as having a tendency to narrow the inquiry by the jury to an imperfect and partial view of the case, and to divert their minds from a full comprehension of the merits of the controversy. The decision of the Circuit Court is affirmed, therefore, with costs.

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MARY ANN THOMAS, PLAINTIFF IN ERROR, v. ELIZA LAWSON  
AND OTHERS, HEIRS AT LAW OF JAMES LAWSON, DECEASED, BY  
GEORGE A. GALLAGHER, THEIR GUARDIAN AD LITEM.

Where a deed was objected to in the Circuit Court on the ground of fraud, but no specific grounds of objection were made, this court cannot inquire into the correctness or incorrectness of the objection.

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*Thomas v. Lawson et al.*

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By the laws of Arkansas, and decisions of its courts, a sheriff's deed of land sold for the non-payment of taxes is made evidence of the regularity and legality of the sale, and the burden of proof of irregularity is cast upon the assailant of the tax title.

The cases upon this point examined.

The law also allows the purchaser of a tax title to file a petition on the chancery side of the State court, whose judgment, or decree, confirming the sale, shall operate as a bar against all persons who may claim the land in consequence of informality or illegality in the proceedings which led to the sale.

A record of such a decree, when produced in the Circuit Court, was conclusive evidence of the title of the purchaser at the sheriff's sale.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Arkansas.

The facts of the case are stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Fowler* for the plaintiff in error, and *Mr. Watkins* for the defendant.

The counsel for the plaintiff in error laid down the following propositions:

1. The general objection, applicable to all collectors' deeds, upon general principles, in the absence of any statute making them *per se* evidence of title, or evidence at all, *unless* all the *material* previous steps and acts required by the laws providing for the assessment and collection of taxes, and sale of lands for the non-payment thereof, &c., make it utterly inadmissible. Upon the different branches of this proposition, viz: that the land must be shown to have been listed or assessed and taxed, and advertised and sold according to law, and that the collector had authority to sell, the counsel cited forty-two authorities, amongst which were 11 Howard, 425; 18 Howard, 142; 16 Howard, 618.

The act of March 5, 1838, made such deeds evidence, but was restricted to sales made under that act, whereas this deed purports to have been made under a sale in 1824.

2. Said deed ought to have been rejected, because, by its details, the said tract of land appears to have been assessed, taxed, and sold, for the year 1824, when the tract of land was

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*Thomas v. Lawson et al.*

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not taxable for *that year*; hence the whole proceeding was illegal and void.

With respect to the decree of the court, confirming the sale, the counsel contended that it was a nullity on account of irregularity in its proceedings.

The counsel for the defendant in error contended for the validity of the deed, both before and after the passage of the act of 1838, the land being held by the original purchaser under a certificate of purchase, and referred to the case of *Pillow v. Roberts*, 13 Howard, 476, and 15 Arkansas Rep., 339; that the land was subject to taxation in 1824; that the act of limitation applied, which commenced to run from the date of the sale, and not from the date of the execution of the collector's deed; and that the decree of confirmation conclusively settled the case.

Mr. Justice DANIEL delivered the opinion of the court.

This was an action of ejectment, instituted by the plaintiff, a citizen of Indiana, and as sole heiress of John Crow, deceased, against James Lawson, a citizen of the State of Arkansas, for the recovery of a tract of land situated in the State last mentioned, described in the declaration, and averred to be of greater value than two thousand dollars. Pending the proceedings in the Circuit Court, Lawson, the original defendant, having died, the cause was revived against the defendants upon the record as his heirs, and upon a trial of the cause, on the 16th day of April, 1856, the jury rendered a verdict for the plaintiff, and on that verdict the court gave a judgment in favor of the plaintiff, with costs of suit. At a subsequent day of the term, the court, on motion of the defendants, awarded a new trial in their behalf; and on the 22d day of April, 1857, this cause being again heard, a verdict was rendered in favor of the defendants below, the defendants in error, and upon this verdict the court pronounced judgment in behalf of the defendants, inclusive of all the costs of suit.

In this action the defendant pleaded six several pleas: first, the general issue not guilty, on which there was a joinder; and five other pleas, all of which were either stricken out or over-

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*Thomas v. Lawson et al.*

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ruled upon demurrer except the fifth, to the following effect: that the defendant was a purchaser of the tract of land in the declaration mentioned, at a sale made by the sheriff and collector of the revenue of the county in which the said land was and is situated, for the non-payment of the taxes assessed and due thereon, and that he has held the peaceable, adverse, and uninterrupted possession of the said land under and by virtue of his said purchase for more than five years next before the commencement of this suit. On this fifth plea, also, issue was joined.

Upon the trial in the court below, the plaintiff gave in evidence a patent from the United States, bearing date on the 1st day of February, 1821, to the plaintiff and others, heirs of John Crow, deceased, for the land in contest, which patent was read without objection, the titles of both plaintiff and defendants being deducible from that act of the Government. The plaintiff further proved that she was the only surviving child and the sole heir of John Crow, and was the widow of James Thomas, who died in the year 1840; and that from the year 1839 she had resided in the State of Indiana, and was a citizen of that State. The plaintiff further proved the possession of Lawson, the ancestor of the defendants, of the land at the time of the institution of this suit, and his refusal to surrender possession to the plaintiff. And here the plaintiff rested her case upon the evidence.

The defendants, in support of their title and right of possession, offered in evidence a deed, bearing date on the 2d day of November, 1846, from W. B. Borden, at that date sheriff, and as such *ex officio* assessor and collector of the taxes for the county of Pulaski, in which county the lands in contest are situated, conveying those lands to the ancestor of the defendants.

In this deed it is recited, that in the year 1824, in conformity with the laws in force in the then Territory of Arkansas, the lands in contest, with several other parts of sections, all situated in the county of Pulaski, were by the sheriff, as *ex officio* assessor and collector for the county, assessed for the taxes payable thereon for that year. That in conformity with the law, and within the time thereby prescribed, the sheriff, as *ex*



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*Thomas v. Lawson et al.*

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*officio* assessor and collector, filed in the office of clerk of the County Court a list of lands and town lots owned and assessed to persons then residents of said county, in which list the lands in the said deed were embraced; that a copy of the list so made and filed was by the said officer put up at the door of the court-house of said county, and published in the *Arkansas State Gazette*, a newspaper printed in the Territory, for four weeks successively before the day of sale, as prescribed by law. That the sheriff as *ex officio* assessor and collector, in like conformity with law, on the 1st day of November, 1824, exposed and offered for sale, at the court-house of the said county, at public auction, the several parcels or parts of sections of land above mentioned, for the payment of the taxes, and the penalty payable upon the amount of those taxes. That Thomas Newton became the purchaser of the several parcels of land, and transferred his certificate of his purchase of those lands to James Lawson. That the sheriff, as *ex officio* assessor and collector, made out and delivered to the purchaser a certificate of purchase containing the requisite description of the taxes and penalty on the lands listed for taxation, and that the amount was paid by Newton, the purchaser. That one year having elapsed since the sale by the sheriff, and that Newton, by James Lawson, having presented to Borden, the sheriff and *ex officio* assessor and collector, the certificate of purchase, and requested a deed to Lawson from the sheriff, the deed from Borden, as sheriff, &c., was made to Lawson.

The defendants next offered in evidence, under the certificate of the clerk of the Circuit Court of Pulaski county, a copy from the records of that court of the acknowledgment in open court, on the 13th of July, 1849, by Borden, as late sheriff and collector of Pulaski county, of the deed executed by him to Lawson for the several parcels of land therein described, including the land in controversy, as having been sold by the predecessor of said Borden as sheriff and collector, under and by virtue of a levy and distress made upon such tracts of land to secure the payment of the State and county taxes, and the penalty and costs and charges due for the years 1824 and 1826.

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*Thomas v. Lawson et al.*

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The defendants also proved that Thomas Newton, by a deed bearing date on the 21st of May, 1846, assigned and conveyed to James Lawson, in his lifetime, all the right, title, interest, and claim, in and to the lands purchased by Newton of the sheriff in the year 1824, and embraced in the deed from Borden, sheriff, &c., to Lawson.

The defendants then offered the record, duly certified, of the proceedings on the chancery side of the Circuit Court of the county of Pulaski, on the 20th day of February, 1850, upon a petition in the name of James Lawson in his lifetime, setting forth the several facts and transactions recited in the deed from Borden to Lawson, and also the execution and recording of that deed; and further setting forth that he, Lawson, after the time allowed by law for the redemption of said lands, and more than six months before the commencement of the then present term of this court, caused a notice stating the authority under which said sheriff's sales took place, and also containing the same description of the lands purchased as that given in said sheriff's deed, and declaring the price at which said tracts were respectively bargained, the nature of the title by which the same are held, and calling on all persons who could set up any right to any part of said lands, in consequence of any irregularity or illegality connected with said sales, to show cause at the first term of the Circuit Court of said county, six months after the publication of said notice, being the present term of the court, why the respective sales so made should not be confirmed, pursuant to a petition to be filed in this court for that purpose, to be inserted and published in the *Arkansas State Democrat*, a newspaper published in Little Rock, for six weeks in succession, the last insertion to be more than six months before the commencement of the present term of this court, as by affidavit of the publisher, setting forth a copy of such notice, with the date of the first publication thereof, and the number of insertions sworn to and subscribed before a justice of the peace of said county, and properly authenticated and filed with said petition, fully appears to the court, and concluding with the decree of that court in the following words:

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*Thomas v. Lawson et al.*

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"Whereupon all and singular the allegations made in said petition being by the production of said deeds and due proofs of the publication of said notice, proven and established to the satisfaction of the court here, and no cause having been shown against the prayer of said petition by any person whomsoever, but the said application being and remaining wholly undefended—

"It is therefore considered and adjudged and decreed by the court here, that said sheriff's sales, and each of them, be, and the same are hereby, in all things confirmed, according to the statute in such case made and provided; and further, that this decree shall operate as a complete bar against any and all persons hereafter claiming said lands, or any part thereof, in consequence of any informality or illegality in any of the proceedings aforesaid, and that the title of each of said tracts of land be decreed and considered as hereby confirmed and completed in said James Lawson and his heirs and assigns forever; saving, however, to infants, persons of unsound mind, imprisoned, beyond the seas, or out of the jurisdiction of the United States, the right to appear and contest the title to said lands, within one year after their disabilities may be removed. And it is ordered that the petitioner pay the costs thereof."

To the admission of this record, the plaintiff in the Circuit Court objected, but the court permitted it to be read in evidence. The deed from Borden, sheriff, to Lawson, of the 2d of November, 1846, was also objected to by the same party, but was allowed to be given in evidence to the jury.

Several prayers for instruction were presented, both by the plaintiff and the defendants, and decisions thereon were made by the court. We shall consider the following only, as comprising the real merits of this controversy:

The objections urged against the admission of the deed from the sheriff to Lawson were—

1st. That the deed and the certificate of its admission to record bore upon their face unmistakable evidence of fraud. What those clear marks of fraud upon the face of those documents were, is not stated with sufficient particularity, in order to a correct comprehension of their character. The court to

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*Thomas v. Lawson et al.*

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whom this objection was presented must have decided upon an inspection of the papers, (probably correctly;) but whether correctly or otherwise, this court cannot now inquire, in compliance with assertions altogether vague, and pointing to no specific vice in any one of those papers. This first objection, therefore, to the admissibility of the deed is of no force.

But the deed from Borden was further objected to, because, as it was alleged—

Secondly. That there was no valid proof of the execution of such paper as a deed.

Thirdly. There was no proof of the authority of the said William B. Borden to execute such deed, or that he was, at the date of its execution or acknowledgment, collector of taxes in and for said county of Pulaski.

Fourthly. It was not accompanied by proof that the said tract of land in controversy was either assessed, or taxed, or advertised, or legally sold, in the year 1824, for taxes, or that the said Henry Armstrong, as such alleged sheriff, assessor, and collector, in the year 1824, had any authority to assess said tract of land for taxation, or to sell it for the non-payment of such taxes.

Fifthly. That such paper, purporting to be such deed, was not admissible in evidence until it should be first proved that all the material steps required by law, preparatory to and in the assessment and taxation of said tract of land, and in the advertisement and sale thereof in the year 1824, and all previous steps required by law prior to the execution of such deed, had been complied with, either by record evidence or by evidence *in pais*.

These four objections are met and overcome, first, by the language of the statutes of Arkansas; and secondly, by the interpretation given of those statutes by the Supreme Court of that State. By the law of Arkansas regulating conveyances, (*vide* Digest of the Laws of 1848, by English and Hempstead, p. 268, sec. 26,) it is declared that "every deed or instrument of writing conveying or affecting real estate, which shall be acknowledged or proved and certified as prescribed by that act, may, together with the certificate of acknowledgment, be

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*Thomas v. Lawson et al.*

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recorded by the recorder of the county where the land to be conveyed or affected thereby shall be situate; and when so recorded, may be read in evidence in any court in this State without further proof of execution." Again, in the same Digest, (pp. 888, 889, sec. 112, title REVENUE,) it is declared, with respect to sales and conveyances made by the sheriff and collector for the non-payment of taxes, that "the deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity; and shall be received in evidence in all courts of this State as a good and valid title in such grantee, his heirs or assigns, *and shall be evidence of the regularity and legality* of the sale of such lands." Again, (p. 889, sec. 114,) it is provided, "that if any collector shall die or be removed from office, or his term of service expire, after selling any land for taxes, and before making and executing a deed for the same, the collector then in office shall make and execute a deed to the purchaser of such lands, in the same manner, and with the like effect, as the officer making such sale would have done."

By another provision of the statute of Arkansas, a like power to that previously mentioned as vested in the sheriff, with respect to delinquent lands, is conferred upon the auditor of public accounts, and, in the exercise of that power by the latter officer, the provisions of the statute, both as to the acts to be performed, and the consequences to ensue from those acts, are substantially and almost literally identical with those relating to the proceedings by the sheriff.

Thus, (Dig., p. 893, sec. 141,) it is enacted that "the auditor shall execute, under his hand and the seal of his office, and deliver to each person purchasing lands or lots at such sale, a deed or conveyance, in which he shall describe the lands or lots sold, and the consideration for which the same were sold, and shall convey to the purchaser all the right, title, interest, and claim, of the State thereto;" and by section 142, "the deed so made shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all the courts of this State as evidence of a good and valid title in

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*Thomas v. Lawson et al.*

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such grantee, his heirs or assigns, and shall be evidence *that all things required by law to be done to make a good and valid sale were done, both by the collector and auditor.*"

In the interpretation of this provision *in pari materia*, the Supreme Court of Arkansas, in the case of Merrick and Fenno v. Hutt, (15 Arkansas Reports, p. 338,) say: "A more comprehensive provision could hardly be found, and it might seem, at first view, to make the tax title derived from the auditor valid against all objections. But that was not the design. The evil to be remedied was, that the entire burden of proof was cast on the purchaser, to show that every requisite of the law had been complied with, and the deed of the officer was not even *prima facie* evidence of the facts therein stated. The general and prevailing principle was, that to divest the owner of land by a sale for taxes, every preliminary step must be shown to be in conformity with the statute; that it was a naked power, not coupled with an interest, and every prerequisite to the exercise of that power must precede it, and that the deed was not *prima facie* evidence that these prerequisites had been observed. The intention and scope of the statute were to change this rule so far as to cast the *onus probandi* on the assailant of the tax title, by making the deed evidence of the title of the purchaser, subject to be overthrown by proof of non-compliance with the substantial requisites of the law. Proof, then, that any of the substantial requisites of the law had been disregarded, or that the taxes have been paid, no matter by whom, would be sufficient to destroy the tax title, whether emanating from the auditor or the collector. The deed of the auditor is not required to *contain recitals*. All that is necessary is to describe the property sold, and the consideration, and to convey to the purchaser all the right, title, interest, and estate, of the former owner, as well as all the right, title, interest, and claim, of the State, to the land."

The same exposition of the statutes of Arkansas, and of the policy and necessity in which those statutes have had their origin, is given in the case of Pillow v. Roberts in this court, reported in the 18th of How., 472. The deed, then, from the sheriff and Collector Borden to Lawson, was clearly *prima facie*

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*Thomas v. Lawson et al.*

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evidence of the assessment, taxation, and forfeiture of the land; of the regularity of every proceeding previously to the sale of the land forfeited; of the competency of the officer making the sale and conveyance; of the legal validity of the sale; and cast upon the assailant of any of these prerequisites the burden of showing the absence or defectiveness of any of them. And without such a showing, that which was *prima facie* proof will be taken as conclusive.

But every question with respect to the assessment of the lands in controversy, or the non-payment of the taxes, or the regularity of the proceedings of the sheriff and collector, inclusive of the execution and recording of the deed from that officer, seems to have been concluded by the petition of the purchaser on the chancery side of the Circuit Court of Pulaski county, and the decree of confirmation pronounced upon that petition as herein already mentioned.

The provisions of the law by which this petition by the purchaser from the sheriff or auditor of lands sold for the non-payment of taxes, and by which the proceedings upon such a petition, and the effect of a decree of confirmation pronounced thereupon, are contained in the Digest of the Laws, pp. 966, 967, under the head of Tax Titles, sections from one to six, inclusive. By the section last mentioned (6th) it is declared, that the judgment or decree confirming said sale shall operate as a complete bar against any and all persons who may thereafter claim said land in consequence of informality or illegality in the proceedings, and the title to said land shall be considered as confirmed and complete in the purchaser thereof, his heirs and assigns, forever. The decree of the Circuit Court of the county of Pulaski, before referred to, expressly sets forth a compliance with every requisite prescribed in the foregoing six sections of the statute, including the notice by publication calling on all persons to show any objection to the purchase from the officer, in consequence of informality, irregularity, or illegality connected with the sale of the lands; the failure of any contestant to appear in obedience to such notice, and the expiration of the time limited in the saving reserved in behalf of those of whom exception is made in the statute.

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*Thomas v. Lawson et al.*

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Upon an inspection of the proceedings in the court of Pulaski, the court below was of the opinion that it constituted a valid title in the defendant against the whole world, and charged the jury that "it divested the title of the plaintiff, and that since the rendition of said decree she had no title to the said tract of land, unless she has, since the date of the said decree, obtained title thereto from or under the said James Lawson, or unless such decree was obtained by fraud."

Of the effect of a decree of confirmation like the one in this case there exists no doubt under the construction of the statutes of Arkansas by the Supreme Court of that State, as declared in the case of *Evans & Black v. Percifull*, (5th Arkansas Rep., 425.) The court in that case held the decree to be conclusive, although they thought it erroneous; yet, inasmuch as it had not been reversed for error, they ruled that it could not be collaterally impeached; and they say, in express terms, that had there been no deed from the officer, *in fact, the decree would have been conclusive of the sufficiency of the evidence to warrant it.*

In the case of *Parker v. Overman*, in 18 Howard, 140, this court, commenting upon the statute of Arkansas, has said: "In case no one appears to contest the regularity of the sale, the court is required to confirm it on finding certain facts to exist; but if opposition is made, and it should appear that the sale was made contrary to law, it became the duty of the court to annul it. The judgment or decree in favor of the grantee in the deed operates as a complete bar against any and all persons who may thereafter claim such land in consequence of any informality or illegality in the proceedings. The jurisdiction of the court over the controversy is founded on the presence of the property, and like a proceeding *in rem* it becomes conclusive against the absent claimant as well as the present contestant."

This interpretation of the statutes of Arkansas is fully coincident with that propounded by the cases of *Merrick & Fenno v. Hutt*, and of *Evans & Black v. Percifull*, already cited; and sustain the correctness of the instructions of the Circuit Court as to the effect of the decree of confirmation of the Circuit Court of Pulaski county.



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*McKinlay et al. v. Morrish et al.*

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A question was raised in the Circuit Court, as to the effect of the five years' statutory limitation upon the rights of the parties; as, for instance, whether that statute would begin to run from the date of the deed of the sheriff or from the period of the recording of that deed, or whether it could operate at all upon a constructive seizin effected by the sheriff's deed, or required, in order to give it effect, an *actual seizin* by the purchaser from the sheriff. This question we do not deem it necessary, or even regular, in this case to discuss or determine. In the first place, the rulings of the court below with regard to it were in favor of the plaintiff in error, and therefore can constitute no wrong or gravamen on his part. In the next place, we consider that question embraced and concluded, or rather excluded, by the proceedings in chancery against the property, and the confirmation of the title by the decree.

The judgment of the Circuit Court is affirmed.

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FINLAY MCKINLAY AND ALEXANDER GARRIOCK, COMPOSING THE FIRM OF MCKINLAY, GARRIOCK, & CO., APPELLANTS, v. WILLIAM MORRISH, MASTER AND CLAIMANT OF THE SHIP PONS AELII, ON BEHALF OF ROBERT AND EDWARD FORMBY, OWNERS OF SAID SHIP.

The rules of pleading in admiralty must be strictly complied with. The evidence and arguments confined to the points put in issue by the allegations of the libel and denial of the answer.

Where the allegation of a libel was, that a cargo of soap had been injured by bad stowage, and by negligence of the captain that he had allowed the seams of the deck to be in an open and leaking condition, by which water had passed through them upon the soap, the evidence shows that the cargo was not injured by bad stowage or leaking from the deck.

The injury to the cargo was caused by the sweat of the ship, her rocking, the nature of the compound of soap, and its long agitation in the boxes, to which it had been subjected in a boisterous passage.

The rule is well established, that a consignee may sue in a court of admiralty, either in his own name, as agent, or in the name of his principal, as he thinks best.

THIS was an appeal from the Circuit Court of the United States for the districts of California, sitting in admiralty.

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*McKinlay et al. v. Morrish et al.*

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The libel was filed in the District Court for the northern district of California, which after hearing dismissed the libel; and upon appeal to the Circuit Court, the decree was affirmed. The libellants then brought the case to this court.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Lord* for the appellants, and *Mr. Brent* and *Mr. Johnson* for the appellees.

The counsel for the appellants contended that the injury did not proceed from the gale occurring shortly after the ship left Liverpool, nor by the heavy weather on the passage around Cape Horn. From that time until the arrival at San Francisco, they met with no heavy weather. The evidence does not show that the damage arose from the sweat of the ship. The perils of the sea not being established, and the cargo being badly damaged, it is for the ship to show everything well done on her part before she can resort to other causes. (See 12 Howard, 280.) The ship was bound to show proper stowage; the evidence is, that the stowage was not proper. The evidence is, that the damage arose from the want of proper caulking, and the leaks thus opened by the heat of the long summer voyage, all which could have been caulked at sea. The evidence is not satisfactory that the damage arose merely from the damp of the soap under the ordinary events of such a voyage.

There is no limitation in the pleadings restricting the libellants in charging the ship as to the cause of the confessedly damaged condition of the cargo. The ship must affirmatively both plead and prove her justification.

The counsel for the appellees contended that the consignees had no right to institute the suit, having repudiated the consignment, and therefore having no interest in the property; that there was no breach of contract on the part of the ship, which was staunch and strong when she started, but met with heavy gales in the Bay of Biscay and at Cape Horn; that the damage to the soap was caused by sweat; that is, by the evap-

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*McKinlay et al. v. Morrish et al.*

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oration of water in the soap, surrounding the boxes with a damp atmosphere; that the soap was an inferior article, and the voyage unusually long.

Mr. Justice WAYNE delivered the opinion of the court.

This is the case of a foreign vessel having been libelled in a port of the United States when about to leave it; her master having refused to pay for the damage said to have been sustained on a shipment of soap, made at Liverpool, to be carried to San Francisco, California, via Honolulu. The shipment was made by Matthew Steele & Son. It was said in the bill of lading to be in good order and condition, and the undertaking was to deliver it so to Messrs. McKinlay, Garriock, & Co., or to their assigns.

The consignees libelled the ship, alleging that, though they were always willing to receive the shipment in good order, the master of the ship had not made it, and that they had refused to receive it, on account of the injury it had sustained from a want of proper care in loading, storing, landing, re-landing, and re-storing the soap, and owing to the careless, negligent, and improper manner of storing it under the deck of the ship, which was open and leaky, through which water passed, and damaged it to the amount of nine thousand five hundred dollars.

The respondent meets the charges by a direct denial of them, averring if the soap had been in any way injured, it may have been from causes beyond his control by any care whatever, and should be attributed to causes or perils excepted to, as they were expressed in the bill of lading, viz: "all and every danger and accident of the seas and navigation of whatsoever nature." The respondent also declares that his ship was, at the time of her sailing from Liverpool, in good, tight, and strong condition, well manned, and that her cargo was well dunnaged and stowed; but that, in the course of the passage to Honolulu, she encountered heavy storms and gales, which strained and caused her to leak, and had compelled him to throw overboard a part of the cargo, for the preservation of the rest of it, and of the vessel; and that during the passage

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*McKinlay et al. v. Morrish et al.*

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he had used every precaution to preserve the cargo that was within *his* power and that of his officers and crew.

The libel and answer are directly at issue, and no answer can be made more responsively to the charges in a bill than this is.

Accordingly, then, to the rules of pleading in admiralty, there is no necessity for doing so; nor are we permitted to consider much of the testimony in this record. When litigants make their case in express allegations and by express denials of them, and then introduce testimony inapplicable to the issues they have made, it is not a part of the case, unless as it shall inferentially bear upon other evidence properly in it, upon which the parties rely for the determination of their controversy. This case furnishes as apt an illustration of the rule just mentioned as can be given. The libellants put their case upon bad and careless stowage, &c., of the soap, and upon leaks in the deck of the ship, through which water passed and damaged it. The respondent denies both; but he goes on to state that his ship was tight and strong for the voyage when he left Liverpool, and both parties question the witnesses as to that fact; though the libellants had not charged that their goods had been injured from that cause, and had not put in issue at all the soundness and seaworthiness of the ship for the voyage she was about to make. This same point of pleading was before this court in the case of *Lawrence v. Minturn*, 17 Howard, 100, 110, 111, which was as learnedly argued, and as deliberately decided, as any other case in admiralty has been in our time. This court then said: "We find the conduct of the master in making the jettison to have been lawful; and the remaining inquiry is, whether the necessity for it is to be attributed to any fault on the part of the master or owners. The libel alleges the loss of the goods to have been through the mere carelessness (just as the libel in this case does) and misconduct of the master and mariners. We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libellants have at the hearing so much insisted upon, and what we think is the main question in this part of the case, *the sufficiency of the ship to carry the cargo*. It

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*McKinlay et al. v. Morrish et al.*

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is no doubt the general rule, that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owner does not amount to negligence or want of skill of the master and mariners. There would be much difficulty, therefore, in maintaining, as a general proposition, that an allegation of negligence of the master would let in the libellant to prove unseaworthiness of the vessel." And in the next paragraph of that opinion, page 111, it will be seen that the rule of pleading in such cases was not enforced only upon the ground that the inquiry in that case necessarily led to an examination whether the *jet-tison was occasioned by the negligence of the master in overloading the ship.*

It was a nice distinction, but a true one, and it will have its influence hereafter upon other cases having the same difficulties as that had. It has been adverted to, to warn the profession that the irregularities of pleading in admiralty, now too frequently occurring, have attracted our attention, and will be treated hereafter according to the rules and practice for pleadings and proofs in admiralty cases. Without doing so, the jurisdiction of admiralty may often be practically extended to controversies not belonging to it; and though that may be inadvertently done, it will not be the less mischievous.

With this rule in view, we will not examine much of the testimony in the case before us, though it was made much of the argument of the respective counsel representing the parties. It excludes from the merits of the case all in the record relating to the storm in the Bay of Biscay, the leak which it caused, and the repair of it. Both parties have treated it, by their pleadings, as having in no way caused any damage to the soap; also, the storm which afterwards tried the seaworthiness of the ship to the utmost, when she was weathering Cape Horn, without any diminution of it, except so far as to inquire if it could have been that the seas which she then shipped had damaged the soap, by the water passing through the seams of a deck imperfectly caulked. And we exclude, also, all that testimony made up of the opinions of supposed experts in regard to the causes of the alteration in the quality of the soap, ex-

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*McKinlay et al. v. Morrish et al.*

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cepting such of them as are sustained by facts which have the character of legal proof.

By treating the case in this way, the controversy becomes exclusively one upon the alleged want of proper care in stowing, &c., the soap; and upon the charge made against the captain of the ship, that he had negligently allowed the seams of her deck to be in an open and leaking condition, by which water had passed through them upon the soap.

Our examination of the case has been made accordingly. It will be found to coincide with the admissions made in his argument by the learned counsel of the appellants. Two of his points were, that the injury or change in the quality of the soap was not owing to the effects of the gale occurring in the Bay of Biscay, shortly after the ship left Liverpool, though it had produced a leak; next, that the heavy weather on the passage around Cape Horn did not produce any leak nor do any injury to the tightness of the ship, reserving, however, the charge that the water which she then shipped had passed through the leaks in her deck, and damaged the soap. Then, after stating other propositions of obligation upon the ship, before she could be released from liability, and omissions of duty by the captain, and the proofs which were necessary to excuse them, which he contended had not been made, the case was put altogether upon bad stowage, and the leaks in the deck, as both had been alleged in the libel.

First, as to the stowage. Two witnesses were examined, both of them professing to know how soap in boxes should be stowed for a long passage. They say that the stowage was improper, on account of the boxes having been placed or piled in tiers in one part of the ship, and that they were stowed up to the main deck, and not choaked. One of them added, that regard should be had, in stowing, to the nature of the goods to be stowed; that soap should not be stowed in so solid a bulk as this was, but should have been distributed more over the ship. Waterman, another witness, who had never seen the ship, and of course knew nothing of the stowage, merely said that soap stowed twenty-five tiers deep, he should think was badly stowed, and would be apt to be injured. Such is the

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*McKinlay et al. v. Morrish et al.*

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whole of the testimony to prove bad stowage in this case, unless the opinions of other witnesses, expressed in the course of their examination, without any facts having been given by them to sustain their opinions, are taken as evidence. On the other hand, Nicholson, a man of more than thirty years' experience as a nautical man, who visited the ship by the invitation of the port warden, to examine the soap, and who went into the hold for that purpose, says, in answer to the question, "How was the cargo stowed? Some of the boxes appeared to me to be re-stowed. I do not think the upper part was the original stowage. There were a great number of them in sight, and the cargo seemed to me to be very well stowed." Noyes, who was called upon, as port warden, to survey the ship, and two days afterwards to survey the cargo, says the soap was stowed in the after part of the ship, abaft the after hatch. It was all stowed together, and well stowed. Then Lowry, the stevedore who discharged the cargo of the ship, who saw her hatches opened, says the soap was well stowed.

There are differences between the witnesses as to the stowage of the soap, but not contradictory assertions. As to credit, they stand alike. But there is a distinction in their declarations, which, with us, is conclusive. The three first named speak of the manner of stowage, with reference to the effect which might be produced upon soap in boxes, stowed in a vessel in tiers, as these boxes were. Without a word of proof from themselves, or from any one else, or from Mr. McCulloch, the chemist, who was called upon by the libellants to analyze the soap as it then was, to show the correctness of the apprehension or opinion of the witnesses, that, from the composition of soap, it was liable to deterioration from being stowed in a mass in the hold of a vessel, and without any evidence that it was customary to stow soap, in boxes, differently. The other three witnesses speak of it as a nautical stowage, and, without any qualification, say that the soap was well stowed. Our conclusion is, that the soap was not injured as a consequence from having been stowed as it was.

We proceed to the consideration of the second charge in the libel. It is also an imputation of negligence upon the captain

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*McKinlay et al. v. Morrish et al.*

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of the ship. It is, that the soap had been injured by the deck having been allowed by him to remain in an open and leaking condition, whereby the water thrown or falling on it passed through upon the soap beneath. It is indefinite as to the time when the leaking of the deck occurred, and uncertain as to the extent of it, but determinate enough to suggest the kind and quantity of testimony which is necessary to sustain such charge in the circumstances under which it has been made. The seaworthiness of the ship when she began the voyage not having been questioned in the libel, it must be taken that she was tight in her deck when she left Liverpool, and, if she became otherwise afterwards, that it must have occurred when she was at sea. There is no direct proof of it in the record, nor any cause, from tempest or storm, from which such an injury to the ship can be presumed. The burden of proof of such an allegation is upon the libellants, and the testimony to sustain it must be positive, or so violently presumptive as to be sufficient, by the rules of evidence, to supply the want of direct proof. Here there is no proof, positive or presumptive, when, where, or from what cause, the leaking of the deck happened, or had been made. None that it had been, or might have been, occasioned by any straining of the ship from the storms which she had encountered on her passage. Indeed, that is disclaimed. None that the oakum with which her decks were caulked had washed out of the seams of it, or that it had shrunk so as to leave them open. And it was only suggested that they were opened by the heat of a long summer passage, and that they could have been recaulked after.

The suggestion is in opposition to the proofs in the case. The ship sailed from Liverpool on the 26th of September, staunch and tight, and arrived at Valparaiso on the 26th or the 27th of January following, just four months and a day from the time of her sailing. The slight injuries which she suffered from the storm in the Bay of Biscay, and those encountered off Cape Horn, were repaired at Valparaiso. Thence she went to Honolulu, on the 28th of February, where she was twenty four days, and caulked there her top-sides and water-ways, and she arrived at San Francisco on the 7th June, having had fine



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*McKinlay et al. v. Morrish et al.*

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weather all the way from Valparaiso. But it is proved that the soap could not have been injured from any leaks in her top-sides or water-ways, as the tiers of boxes next to them on either side were in a better condition than those which had been piled further off. These dates show that the ship had not a longer passage to Valparaiso than is usual at the time of year when she was making it; also, that it had been made through different latitudes, without encountering any great continuous heats—certainly not such as could have had the effect to displace or shrink the caulking of the deck into leaking, which is not denied to have been good and tight when the ship left Liverpool. It is not probable that such an exposure for so short a time had forced her deck seams. Besides, it has not been shown by any reliable testimony that there had been, at any time when the ship was on her way to Valparaiso, any leaking from her deck, or any such afterwards, until her arrival in San Francisco, from which by any possibility the soap could have been injured in the way and to the extent it was represented to have been by some of the witnesses, who expressed the opinion that there had been leaks in the deck of the ship, through which salt water had leaked upon the soap. Indeed, it appears to us that all of the witnesses who said so, did it rather by way of inference from the caulking which another witness said had been done to the ship, and from the condition in which the soap was, than from an examination of the ship. The witness Goodsell, more relied upon than any other witness to prove the leaks in the deck, does not do so satisfactorily from the usual examination made by shipwrights when they are called upon to ascertain such a fact. He says: "I found the poop-deck, lately caulked, leaking on larboard side—six on starboard and one seam about half on the starboard side, to main deck. I *should think* that the water-way seams, plank-shear seams, and one or two seams inside to main deck, or main deck, *looked* as if water had run down into the hold of the ship on both sides." He adds, he went into the hold of the ship and examined the under part of the deck "I saw *indications* of the deck having leaked in the wake of the seams I have been speaking of: *they looked* as if they had leaked

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*McKinlay et al. v. Morrish et al.*

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all along, but more abaft than forward of the main deck." This is very uncertain testimony; more of opinion than fact in it, even as to the caulking of which he speaks, and the result of all that he says concerning the seams below the deck, has more of inspection in it than of examination. The difference between them will readily be recognised from the positive language of two other witnesses, who say they examined the seams of the deck below with their knives, and found them hard; one of them adding, it is impossible for a man to tell, after two or three weeks, whether a vessel is newly caulked, without trying her seams. Lowry, the stevedore who discharged the cargo, upon being asked if he had seen any traces of salt water in the top of the boxes of the soap, or on the ceiling of the deck, answers that he had not, but that he saw some places marked with chalk by some persons; that he tried them with his knife, and found them perfectly tight. Such is the testimony in the case, concerning the charge in the libel that the soap had been damaged by leaks in the deck of the ship, which her captain had neglected to have caulked. In our opinion, it is altogether insufficient. Noyes, the port warden, who surveyed the ship, says he could find no leaks over or above where the soap was, that he could discover. He also saw no traces of the deck having been recently caulked. Indeed, there is not a witness who has said that there were leaks in the deck. Several express the opinion that there were, from the discoloration of the boxes on them outside, and from that of the soap in them. Goodsell ventures further than any other witness, to cause such an impression; but his language is, "I should think," and it "looked" to him as if water had run down into the hold from the water-way seams, the plank-shear seams, and one or two seams inside, to deck or main deck. This conjectural way of speaking by a witness must yield to the positive declarations of Nicholson, Lowry, and Noyes.

Having determined that the soap had not been injured by bad stowage or leaking from the deck, we will now briefly state to what causes its altered condition should be attributed. We have concluded that its discoloration and dampness are to be found in the acknowledged facts and proofs in the cause. The

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*McKinlay et al. v. Morrish et al.*

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shipment was made at Liverpool on the 21st June, and was on board of the ship for a year, less fourteen days. After the shipment and stowage, the ship remained all of the summer at the dock in Liverpool. She sailed on the 26th of September. From that time the ship's hatches were closed until her arrival at Honolulu, in February. They were then opened for the purpose of discharging a part of the cargo which had been shipped for Honolulu. To do that, it was necessary to remove about three hundred boxes of the soap from their stowage, and to land them. They were taken to the ship, re-stowed as they had been at first, and it does not appear by any evidence that it had been perceived at Honolulu by any one that this upper tier so removed had been injured, or that the boxes had then any appearance of water having leaked upon them. The ship sailed from Honolulu and arrived at San Francisco on the 7th June. From the day of her sailing, the 26th September, she was at no time within such a temperature of heat as would of itself have impaired the quality of the soap. From England, in 10° north of the equator, the average temperature from the time of her sailing is 62°. Ten degrees north and south of the equator the average temperature for the months of September and October is 81°.

The average temperature in November is about 41°, and that of Valparaiso is about 62°. These averages of temperature are taken from the most approved charts, and are decisive that the soap has not been injured by the temperatures through which the ship passed on her passage to Valparaiso. From that port the ship came to Honolulu, a distance not much short of six thousand miles, in the most favorable weather, without encountering heavy seas or head winds. She made that distance in the usual time, forty-five or fifty days. Honolulu is in the latitude of 21° 19' north, longitude 157° 52' west. Nor are the temperatures such between Valparaiso and Honolulu as could have produced any change in the condition of the soap. From Honolulu the usual run to San Francisco is from fifteen to twenty days. As a general rule, the course of ships bound from the first to San Francisco would be to the northward of it, to be sure of good winds. In the absence, then, of other

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*McKinlay et al. v. Morrish et al.*

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probable causes, to account for the change in the quality of the soap, we must resort to the proofs on the record, and from them we have concluded that the soap was injured by the temperature of the ship's hold, or what is called the sweat of the ship, which no mode of ventilation, consistent with safe navigation, has yet been thought sufficient to prevent. In this particular the ship was not more liable from defective construction to this vapor than merchant vessels ordinarily are. Her hatchways were good, the covers for them are not complained of, her hatch-bars and tarpaulings were sufficient, or they are not denied to have been so; and it has not been suggested that they were not all applied to cover the hatchways, and to protect the cargo from sea-water and rain. Nor is this sweat in ships any mystery to practical seamen. They term it to be vapor emitted from the mixed cargoes of ships by the heat of the hold of a ship, cast off sometimes only in fumes, at other times in steam, which shows itself in the latter case sometimes in drops of water in the same way as rain is produced from vapor. Several of the witnesses—all of them were accustomed to the sea—say, that the sweat of this vessel caused the discoloration of this soap. Besides, it was a second-class article, differing originally in color from a first-rate article of the same kind. It is true that the chemist who analyzed it says that it had been made of good materials, and was well saponified, and he says that sweat is a mere *evolution* of water in a state of vapor; and that the boxes could not have been stained in that way, and that they were stained by some external means. But the proofs in the case show that there was no leakage in the deck by which water could have passed upon them; it must yield to the declarations of those witnesses better acquainted than he is, from their professional acquaintance with the effects of the sweat of the soap upon these cases. We unhesitatingly ascribe the discoloration and dampness of the soap to the rocking of the ship, the nature of the compound of soap, and to the long agitation of the soap in the boxes to which it had been subjected in a boistérous passage. The devaporation of water from the vapor of the soap itself, with which it is cleansed in the making, heated by the sweat of the ship, would be con-

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*McKinlay et al. v. Morrish et al.*

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contrated in the boxes, upon the soap, and would discolor it and make it damp, without any sensible diminution of its weight; and we are confirmed in this conclusion by the witnesses who examined and weighed it, having testified that the boxes were of the same weight marked upon them when they were shipped at Liverpool. We feel bound to notice one point made in the argument of the cause by the counsel of the appellees, which is not an open question in this court. It was, that the appellants had no legal title to maintain their libel. In the case of *Houseman v. The Schooner "North Carolina,"* (15 Pet., 49,) the same objection was made. This court said: "An objection has been taken to the right of the appellee to sue in his own name, as agent for the consignees, or to sue at all, as his power of attorney from them bears date after the libel was filed; and it is also objected, that J. & C. Lawton, the consignees, had no right to institute proceedings to recover more than their proportion of the cargo shipped on their own account. No authority has been produced in support of these objections, and we consider it as well settled in admiralty proceedings, that the agent of absent owners may libel, either in his own name, as agent, or in the name of his principals, as he thinks best; that the power of attorney, subsequent to the libel, is a sufficient ratification of what he had done in their behalf, and that the consignees have such an interest in the whole cargo; that they may proceed in this case, not only for what belonged to them and was shipped on their account, but for that portion also which was shipped by Porter, as his own, and consigned to them." The same conclusion was repeated in *17 Howard, Lawrence and Minturn*, without any qualification, as we understand that case. In the first as well as in the second of these cases, the point was put on the interest which a consignee has in the consignment, as consignee, and not as owner of any part of it; that, from the nature of the contract of a bill of lading, the consignee had a right to sue, in a court of admiralty, for any breach of it. Whatever may be the uncertainty concerning the consignee's right to sue in a court of law, from the conflicting decisions to be found upon that right, there are none that he may sue in a court of admiralty in the United States.

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*United States v. City Bank of Columbus.*

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When that case, however, occurs in this court, it will be decided; and we now merely remark that, from our examination of most of the cases in the common-law reports, upon the facts of those cases, we have been brought to the conclusion that there is no rule of general application as to when the consignor or consignee should bring the suit at common law, but that it will always be important to consider in whom the right of property, and sometimes in whom the right of possession, was vested at the time of the breach of the contract or neglect of duty which is complained of.

We direct the affirmance of the decree from which this appeal was taken.

Mr. Justice NELSON dissented.

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**THE UNITED STATES, PLAINTIFFS IN ERROR, v. THE CITY BANK OF COLUMBUS.**

Where the cashier of a bank wrote to the Secretary of the Treasury, saying that the bearer of the letter was authorized to contract for the transfer of money from New York to New Orleans, and such a transaction was not within the scope of the powers of the cashier, nor authorized by the directors, the bank was not bound to reimburse the money which the Secretary of the Treasury advanced.

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of Ohio.

The facts of the case and also the instructions given to the jury upon the trial are all set forth in the opinion of the court.

It was argued by *Mr. Hull* and *Mr. Black* (Attorney General) for the United States, and by *Mr. Stanbery* for the defendant.

The Attorney General contended that it might be true that the cashier had no power to make the appointment, yet the directors had such power, and the cashier's letter may fairly

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*United States v. City Bank of Columbus.*

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be considered as a certificate that the appointment had been legally made; because, if the directors had appointed Miner, the cashier would have written just such a letter as he did write. Amongst other illustrations of this principle was the following:

If it were true that the appointment of an agent by a corporation must be evidenced by an entry on the minutes, or by any other writing, then it might plausibly be urged that the cashier or other certifying officer has only the power of certifying to a copy of such record or writing. But there is no such rule of law.

In the *Bank of the United States v. Dandridge*, (12 Wheat., 34,) it was distinctly decided by this court that the acts of a corporation, *though not reduced to writing*, are valid and binding, and may be proved *aliunde*. It is true that this doctrine did not command the assent of Chief Justice Marshall, who, in an able dissenting opinion, maintained the contrary; but it is now well-established law. (See Angell and Ames on Corp., sec. 284; *Conro v. Port Henry Iron Company*, 12 Barbour Sup. Ct. Reps., 53; *Burgess v. Pue*, 2 Gill, 287; *Richardson v. St. Joseph Iron Company*, 5 Blackford, 148; *Badger v. Bank of Cumberland*, 26 Maine, 485; *Elysville Manufacturing Co., v. Okisko Company*, 1 Md. Chy. Dec., 398.)

These authorities conclusively establish that, unless the charter provides otherwise, (as in this case it does not,) the appointment of an agent need not be in writing, or entered upon the minutes, but may be by parol, and provable like other facts.

But if this be so, there is no foundation for the assumption that the cashier can only certify the agency by copying the record of the appointment, for *non constat* that there is any record. And no custom of this bank is shown to the contrary. Even if it had been, it could have no effect, unless the Secretary of the Treasury had notice of it; but, in fact, the cashier testifies that meetings of the board were held *not* entered on the minutes.

We have thus far shown—

1st. That the directors had the power to appoint an agent to make this contract on behalf of the bank

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*United States v. City Bank of Columbus.*

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2d. That the appointment of such agent need not be entered on the minutes, or reduced to writing.

3d. That the cashier is the proper officer to certify the fact of such appointment.

But the act of the cashier, within the scope of his duties, is the act of the bank. (*Badger v. Cumberland*, 26 Maine, 435; *Story Agency*, sec. 114; *Angell and Ames Corp.*, sec. 300.)

It matters not that the thing certified was not true in fact. A principal is bound by the false and fraudulent representations of his agent in the scope of his authority. (*Story Agency*, sec. 139; *ib.*, sec. 452.)

The next proposition is, that the bank having, through their cashier, asserted that Mr. Miner was agent, and the Secretary of the Treasury having acted on that information, the bank is now estopped to deny it.

The doctrine of estoppel *in pais* is thus distinctly stated by Lord Denman in *Pickard v. Sears*, (6 Ad. and Ellis, 469; 33 E. C. L. Reps., 117:)

"But the rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring, against the latter, a different state of things as existing at the same time."

This doctrine is recognised by all courts of the common law. (See *Brown v. Wheeler*, 17 Conn., 353; *Carpenter v. Stillwell*, 12 Barbour Sup. Ct. Reps., 136.)

This doctrine applies to corporations as fully as to individuals. (*Angell and Ames on Corp.*, sec. 238, p. 232.)

In *Lovett v. German Reformed Church*, (12 Barbour Sup. Ct. Reps., 81,) the court held the corporation estopped by the acts of acting trustees, though not rightfully in office.

In *Bank of Genesee v. Patchin Bank*, (3 Kernan's Reps., N. Y., p. 317,) the same doctrine is recognised.

But a corporation can do acts, or make declarations, in no other way than through its officers and agents. Therefore a corporation will be estopped by the acts or declarations of its officer or agent, acting in the sphere of his authority,



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*United States v. City Bank of Columbus.*

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in all cases where an individual would be estopped by his own.

Applying the above rules to this case, we find every ingredient mentioned by Lord Denman as required to make an estoppel.

This bank, through the written certificate of their cashier, he being the officer empowered by the usage of banks to certify its doings, has wilfully caused the Secretary of the Treasury to believe that Miner was authorized by the bank to contract for the transfer of funds. The Secretary was thereby induced to act on that belief, and to place in the hands of said Miner \$100,000, to be transferred to New Orleans. The bank is therefore *concluded* from averring that Miner was not at that time its agent.

The case is therefore with the plaintiff upon the law.

*Mr. Stanbery*, for the defendant in error, contended that it was not within the power of a cashier, in virtue of his office, to make such a contract, or rather to authorize another to make it, and referred to 8 Wheaton, 860; 6 Peters, 59; 12 Eng. Law and Eq. Rep., 389; 1 Selt. N. Y. Rep., 332.

The nature and importance of the contract was such as to require the judgment of the directors. This is altogether beyond the usual business of buying and selling exchange. Neither the charter nor the by-laws gave this power to the cashier.

5. It has been argued that the letter of Moodie purports to be a certificate that Miner was duly authorized by the bank; and as the cashier is the certifying officer of the acts of the board, the bank is estopped from denying the truth of this certificate.

In the first place, this letter contains no certificate of an authority *given by the board*; but if it did, nay, if it purported to copy a resolution of the board, and it should appear there was no such resolution, the bank would not be bound.

The argument on the other side would indirectly make the principal liable in all cases where the agent clothes his unauthorized act with a false representation of authority from the principal.

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*United States v. City Bank of Columbus.*

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This subject is well discussed in the *Mechanics' Bank v. The New York and New Haven R. R. Co.*, 3 Kernan, 636.

Mr. Justice WAYNE delivered the opinion of the court.

The only question arising on this record is, whether the court erred in so much of the charge to the jury as is set out in the bill of exceptions. Objections were taken in the course of the trial to testimony, but no exceptions were taken to the rulings of the court upon them. The declaration in the case contained two counts—one of them alleging that a contract had been made between the City Bank of Columbus and the United States, by which the bank agreed, on the 1st November, 1856, to transfer one hundred thousand dollars of the public money from New York to New Orleans by the first of January, 1851, free of charge; and the other account for money had and received by the bank for the use of the United States.

The charge given by the court was confined to the first count. The bill of exceptions sets out the following evidence, which was introduced by the United States to show a contract with the bank.

The following letter was written by the cashier of the bank:

CITY BANK OF COLUMBUS,  
*Columbus, Ohio, 26th October, 1850.*

SIR: The bearer, Colonel William Miner, a director of this bank, is authorized, on behalf of this institution, to make proposals for the purchase of United States stocks to the amount of one hundred thousand dollars. He is also authorized, if consistent with the rules of the Treasury Department, to contract, on behalf of this institution, for the transfer of money from the East to the South or West, for the Government.

I have the honor to be, sir, your obedient servant,

THOMAS MOODIE, *Cashier.*

HON. THOMAS CORWIN,

*Secretary of the Treasury, Washington City.*

This letter was presented by Mr. Miner to Mr. Corwin on the first of November, 1850. On the same day, Mr. Corwin wrote to Mr. Miner the following letter:

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*United States v. City Bank of Columbus.*

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TREASURY DEPARTMENT, November 1, 1850.

SIR: Your proposition of this date, to transfer \$100,000 from New York or Philadelphia to New Orleans, by the 1st January next, free of charge to the Department, is accepted. You will receive herewith a transfer draft on the Assistant Treasurer at New York, in favor of the Assistant Treasurer at New Orleans, for \$100,000, with the authority endorsed to make the payment at New York to you.

I am, very respectfully,

THOMAS CORWIN, *Secretary.*

This was followed by an undertaking for the transfer of one hundred thousand dollars for the Government from New York to New Orleans:

WASHINGTON CITY, November 1, 1850.

This will certify that I have contracted with the United States Treasury, as the agent of the City Bank of Columbus, to transfer \$100,000 from New York to New Orleans, to be deposited in the Treasury at the latter-named city by the first day of January, 1851, free of charge. I have, in pursuance of said contract, this day received a draft in my own hand for one hundred thousand dollars on the United States Treasury at New York city, which is to be accounted for in said contract.

WILLIAM MINER.

Miner received the draft, and cashed it in person on the 2d November, 1850; but what he did with it no one knows, or this record does not show. It is certain that it was not repaid in New Orleans according to the contract; and there are no proofs on this record which can raise a presumption that the Bank of Columbus ever received a dollar of it. There is proof that Miner was all that time a director of the bank, and that Moodie, who gave him the letter to the Secretary of the Treasury, was the cashier, and that he signed his name to the letter as cashier; and that the letter had been copied into the letter book of the bank. A by-law of the bank was also put in proof, to show that it might be inferred from it that he had authority, as cashier, to empower Mr. Miner, as a director of

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*United States v. City Bank of Columbus.*

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the bank, to enter into such a contract as he had made with the Secretary of the Treasury. The by-law is: "A committee of two shall be appointed every six months to advise with the president and cashier. In their absence, all the ordinary business of the bank may be done by the president and cashier; and if either of them be not present, then by the other alone; but any discount, negotiation, or contract, whether made by the board or committee, is to be done by the consent of all present."

It was also shown that there had not been a meeting of the directors in either July or August, 1850. That there had been a meeting on the 21st September, 1850, and another November 4th, 1850, nine days before the cashier gave his letter to Miner, and three days after the date of Miner's contract, to transfer the money from New York to New Orleans. The minutes of the bank, as kept by the cashier, of the meetings of the directors, do not show any intention upon the part of the directors to enter into a contract for the purpose of buying stock of the United States, or for the transmission of the money of the United States from the East to the South or West, as Moodie expresses it in his letter; or that after the negotiation of Miner, and his receiving the money from the Assistant Treasurer in New York, that the directors or president of the bank had any knowledge of the transaction until after Miner's default to pay the amount at New Orleans. Moodie testifies that he wrote the letter of the 26th of October, 1850, for Miner to negotiate with the Secretary of the Treasury, without the knowledge of the president or any of the directors of the bank, except Miner himself, and that the fact that such a letter had been written was not communicated by him to any of the directors until January after, though he had caused a copy of it to be put in the letter book. All of the directors, at the time of the transaction, have sworn that Moodie had not been authorized by the board or by any of themselves to constitute Miner such agent; that they had no knowledge of Moodie's letter, and that they never sanctioned the same. And there is other testimony in the case, that Moodie, as cashier, had not the power to depute Miner for any such purpose, and that it

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*United States v. City Bank of Columbus.*

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would not have been done but by a resolution of the board of directors. Upon this evidence, and some other which it is not material to notice, the court charged the jury. After they had retired, and consulted for some time, they came into court and asked for further instructions, and the court gave them the following charge in reference to the contract set out in the first count of the declaration: "That if they should find that the letter written by Moodie was his own act, and had been given without the knowledge or authority of the board of directors, or any of them individually, except Miner, and that the agency of Miner was not constituted by or known to the board of directors, or the directors individually, or any of them except Miner, but was the act of the cashier alone; and if they should find that Moodie had no power as cashier, except such as belonged to the office of cashier generally, or such as are given by the charter or by the by-law or other law or usage of the said bank, that the defendant was not concluded by that letter, and is not bound by the contract made by Miner, without some subsequent ratification of the same, though the Secretary had, in contracting with Miner, relied upon it as the act of the bank."

To this charge the plaintiff excepted, and, on account of that exception alone, the case has been brought to this court by writ of error. In our opinion, no charge could have been more comprehensive of the merits of the case, more precise in its application to the particulars of the testimony introduced by the plaintiff and the defendant, or more expressive of what the law is upon such a state of facts. It is all that the litigants could have expected, and is liberal to both. It is also in coincidence with the views generally entertained of the powers and duties of the cashiers of banks, by those most familiar with the management and business of banks, and perfectly so with such as have been expressed by this court in previous reported cases. In *Fleckner v. The Bank of the United States*, (8 Wheat., 338, 356, 357,) this court said, the charter authorizes the president and directors to appoint a cashier and other officers of the bank, and gives the president and directors, or a majority of them, full power and authority to make all such rules and reg-

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*United States v. City Bank of Columbus.*

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ulations for the government of the affairs and conducting the business of said bank, as shall not be contrary to the act of incorporation. It contains no regulations as to the duties of cashiers; with the directors it would rest to fix the duties of cashier or other officers. Whether they have made any regulation upon this subject, does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed *prima facie* evidence that they fell within the scope of his duty. In the case *Bank of the United States v. Dunn*, (6 Peters, 51,) the court would not permit the president and cashier of the bank to bind it by their agreement with the endorser of a promissory note, that he should not be liable on his endorsement. It said it is not the duty of the cashier and president to make such contracts, nor have they power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which they may think proper in loaning money. The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business.

The term ordinary business, with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our State courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the

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*United States v. City Bank of Columbus.*

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usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary. The case of *Kirk v. Bell*, (12 English and Common-Law Reports, 339,) and that of *Hoyt v. Thompson*, were very appropriately cited by the counsel of the appellee, in this connection; and we think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business, from which contracts are alleged to have been made, is, to test that fact by an inquiry into the corporate ability which has been given to them and to their subordinate officers, or which the directors of the company can confer upon the latter to act for them. Such was the view of this court when it decided, in the case of the Bank of the United States *v. Dunn*, (6 Peters,) that a release given by its president and cashier to the endorser of a promissory note of his liability upon it, did not bind the bank, neither nor both having any authority to make contracts of that kind. The case before us is one in which a cashier acts alone, and in which he testifies that he did so without any consultation with the president or directors of the company, and of which they had no information from him of the transaction until after the failure of Miner to pay the money in New Orleans. The act under which the City Bank of Columbus became a corporation does not, in any part of it, give any power to a cashier to act independently of the directors. No specific power is given to the directors to appoint a cashier. In the general power given to the directors to appoint officers to do the ordinary business of the bank, they have an authority to appoint a cashier, and such an appointment is a limitation of that officer's executive function in doing the business of the bank. It cannot be pretended that the directors, as a whole, or any one of them, except Miner, consented to the cashier's designation of Miner for any such purpose as was concluded between them, to induce the Secretary to believe that Miner was the agent of the bank, either to buy stock of the United States or to enter into

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*State of New York v. Dibble.*

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contracts for the transmission of money, free of charge, to those posts where the United States should designate it to be put. Such a power in the Secretary of the Treasury is a necessary one for the transaction of the business of the Government, pervading, as it does, every part of the country. The exercise of it, however, requires great care and caution in the selection of agents for such a purpose, and no authority short of the most certain should be taken to establish the representative character of any one for a private company or corporation to enter into such a contract with the Secretary.

The United States, as plaintiff in this action, has failed to establish the contract which it alleges in its declaration had been made with the City Bank of Columbus, for the transmission of money; and we direct the judgment given in the court below to be affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, EX REL. ASA CUTLER, JOHN UNDERHILL, JUN., AND ARZA UNDERHILL, PLAINTIFFS IN ERROR, v. EDGAR C. DIBBLE, COUNTY JUDGE OF GENESSEE COUNTY.

A statute of the State of New York, making it unlawful for any persons other than Indians to settle or reside upon any lands belonging to or occupied by any nation or tribe of Indians within that State, and providing for the summary ejectment of such persons, is not in conflict with the Constitution of the United States, or any treaty, or act of Congress, and the proceedings under it did not deprive the persons thus removed of property or rights secured to them by any treaty or act of Congress.

THIS case was brought up from the Supreme Court of the State of New York by a writ of error issued under the 25th section of the judiciary act.

The case is stated in the opinion of the court, and is reported in the New York State courts, in 18 Barb., 412, and 2d vol. of Smith's Reports of the Court of Appeals, 208, being 16 New York Reports.



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*State of New York v. Dibble.*

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It was argued by *Mr. Brown* and *Mr. Gillet* for the plaintiffs in error, and by *Mr. Martindale* for the defendant.

The only question in this court was, whether the statute of 1821 was in conflict with the Constitution of the United States, or any treaty, or act of Congress, and whether the proceeding under it had deprived the relators of property or rights secured to them by any treaty or act of Congress.

The counsel for the plaintiffs in error contended that the Constitution of the United States had given to Congress power to regulate commerce with the Indian tribes; that this power had been exercised by the passage of the act of 1802, (2 Stat. at L., 139;) that the act of 1834 (4 Stat. at L., 729) repealed so much of this act as applied to the Indians west of the Mississippi, but left it operative upon the Indians east of the Mississippi; that the law of New York was repugnant to this act of Congress; that by the treaty of 1794 (7 Stat. at L., 45, art. 2) the President of the United States was made the exclusive judge of the force and measures necessary to remove intruders upon these very Indians; that both these enactments could not stand, and if so, the State law must give way; and that there were reservations in New York where no treaties were in force upon which the State law could properly operate. It was also contended, that even if the New York law of 1821 was not invalid at the time of its passage, it had been superseded and annulled by the treaties which the United States had made with the Indians in question in 1838 and 1842, so far at least that Ogden and Fellows could enjoy the rights which those treaties secured to them.

In support of the views first mentioned, the counsel referred to the well-known cases of *Sturges v. Crowninshield*, and *Gibbons v. Ogden*, and also to 5 Howard, 410; 14 Peters, 540; 3 Cowen, 714; 7 Howard, 288.

The counsel for the defendant in error contended that the act of Congress of 1802 had no application to the New York Indians; that, from the earliest history of the colony of New

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*State of New York v. Dibble.*

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York, the Indians, and especially the Senecas, had been under the protection of her laws, and that such protection had been continued from the time of the Revolution; that the pre-emptive right to the Indian lands within the State of New York belonged to the State, and was never ceded to the United States; that, consequently, the power given to Congress to regulate commerce, did not apply to such tribes; that the United States by their measures had been the means of breaking up the tribe of Seneca Indians into small and detached bands or reservations, which were necessarily placed under the police regulations of the State, made to protect the public peace. With respect to the alleged treaties, the counsel contended that the Tonawandas had never executed them, but constantly and unanimously refused to be bound by them; that they have never received any portion of the consideration moneys provided in said deeds; that the land upon which they now lived had always been occupied by them, and that neither Congress nor the treaty-making power could arbitrarily take away their property.

Mr. Justice GRIER delivered the opinion of the court.

This case is brought before us by a writ of error to the Supreme Court of New York, under the 25th section of the judiciary act. It had its origin in a proceeding before the county judge of Genesee county, instituted by the district attorney against Asa Cutler, John Underhill, and Arza Underhill, the relators, pursuant to the provisions of an act of Assembly entitled "An act respecting intrusion on Indian lands," passed March 31, 1821.

This act made it unlawful for any persons other than Indians to settle and reside upon lands belonging to or occupied by any tribe of Indians, and declared void all contracts made by any Indians, whereby any other than Indians should be permitted to reside on such lands; and if any persons should settle or reside on any such lands contrary to the act, it was made the duty of any judge of any county court where such lands were situated, on complaint made to him, and due proof of such residence or settlement, to issue his warrant, directed to the sheriff, commanding him to remove such persons.

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*State of New York v. Dibble.*

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On notice to the relators of the institution of this proceeding, they appeared before the judge and pleaded to his jurisdiction, on the ground that they had entered and occupied the lands, claiming title under a written instrument adversely to the Seneca nation of Indians, and therefore, by the Constitution and laws of the State, they were entitled to a trial by jury, according to the course of the common law, and could not thus be removed by summary proceedings under this act.

This plea was overruled by the judge. The relators then pleaded that this tract of 12,800 acres, called the Tonawanda reservation, was not owned by the Seneca Indians; that by a treaty made with the United States on the 20th of May, 1842, the Seneca nation of Indians had by indenture set forth in the treaty conveyed to Thomas Ludlow Ogden and Joseph Fellows this tract of land, with others; that this grant was duly confirmed by the State of Massachusetts, pursuant to the provisions of the act of cession made between that State and the State of New York, on the 16th of December, 1786; that the whole amount of the consideration stipulated by the treaty and deed had been paid by said Ogden and Fellows; and that relators were in possession under said Ogden and Fellows, and adversely to the Indians. They therefore denied the power and authority of the judge to determine their right to the lands in their possession, or to remove them, under the powers conferred by the act of Assembly of New York.

After hearing the parties, the judge decided against the relators, who removed the proceedings by *certiorari* to the Supreme Court.

The record contains the testimony on both sides, and numerous documents concerning the treaty with the Seneca Indians, and also the subsequent proceedings by the officers of the Government. It will not be necessary to a clear apprehension of our decision in this case to state them particularly, nor is it material to our inquiry whether the judge may have erred in his decision, that "the Seneca nation had not duly granted and conveyed the reserve in question to Ogden and Fellows."

The Supreme Court and Court of Appeals of New York have decided, "that the provisions of this act respecting intrusions

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*State of New York v. Dibble.*

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on Indian lands, which authorize the summary removal of persons, other than Indians, who settle or reside upon lands belonging to or occupied by any nation or tribe of Indians, are constitutional, and that a citizen who enters upon their land before their title has been extinguished, and they have removed, or have been removed by the act of the Government, can acquire no such right of property or possession as is within the protection of the provisions of the Constitution which secure a trial by jury." They therefore affirmed the judgment of the county judge.

The only question which this court can be called on to decide is, whether this law is in conflict with the Constitution of the United States, or any treaty or act of Congress, and whether this proceeding under it has deprived the relators of property or rights secured to them by any treaty or act of Congress.

The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is therefore not contrary to the Constitution of the United States.

Nor is this statute in conflict with any act of Congress, as no law of Congress can be found which authorizes white men to intrude on the possessions of Indians.

Is it in conflict with rights acquired by Ogden and Fellows, under the treaty, and contract making a part of it? If the treaty of 1842 had been executed; if the United States, in their character of sovereign guardian of this nation, had delivered up the possession to these purchasers, then this statute of New York, when applied to them, would clearly be in conflict with their rights acquired under the treaty. But, by the case, it is admitted that the Indians have not been removed by the Uni-

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*State of New York v. Dibble.*

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ted States. The Tonawanda band is in peaceable possession of its reserve, and has hitherto refused to surrender it. Unless, therefore, these persons claiming under Ogden and Fellows have by the treaty a right of entry into these lands, and, as a consequence, to forcibly oust the possessors or turn them out by action of ejectment, they cannot allege that this summary removal by authority of the statute of New York is in conflict with the treaty, or any rights secured to the purchasers under it. This proceeding does not affect their title. The question of the validity of this treaty to bind the Tonawanda band is one to be decided, not by the courts, but by the political power which acted for and with the Indians. So far as the statute of New York is concerned, it only requires that the Indians be in possession; they are not bound to show that they are owners. They may invoke the aid of the statute against all white intruders, so long as they remain in the peaceable possession of their lands.

The relators cannot claim the protection of the treaty, unless they have a right of entry given them by it, before the Indians are removed by the Government. This court have decided, in the case of *Fellows v. Blacksmith*, (19 Howard, 366,) that this treaty has made no provision as to the mode or manner in which the removal of the Indians or the surrender of their reservations was to take place; that it can be carried into execution only by the authority or power of the Government which was a party to it. The Indians are to be removed to their new homes by their guardians, the United States, and cannot be expelled by irregular force or violence of the individuals who claim to have purchased their lands, nor even by the intervention of the courts of justice. Until such removal and surrender of possession by the intervention of the Government of the United States, the Indians and their possessions are protected, by the laws of New York, from the intrusion of their white neighbors.

We are of opinion, therefore, that this statute and the proceeding in this case are not in conflict with the treaty in question, or with any act of Congress, or with the Constitution of the United States. The judgment of the Court of Appeals of New York is therefore affirmed, with costs

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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**THE NEW YORK AND LIVERPOOL UNITED STATES MAIL STEAMSHIP COMPANY, CLAIMANTS OF THE STEAMSHIP PACIFIC, HER TACKLE, &C., APPELLANTS, v. OTIS P. RUMBALL, LIBELLANT.**

In a collision between a sailing vessel and a steamer, which took place at sea, near the shore of Long Island, where the course of the sailing vessel was converging to the track of the steamer, the sailing vessel being then close hauled upon the wind, the evidence shows that the steamer was in fault.

The sailing vessel did not change her course, and her whole company, including the master and mate, were on deck.

The rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain.

These rules require sailing vessels, when approaching a steamer, to keep their course; and steamers, under such circumstances, as a general rule, are required to keep out of the way.

Under this rule, the steamer must of necessity determine for herself, and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left, or to stop; and in order that she may not be deprived of the means of determining the matter wisely, it is required that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty, and fulfil the requirement of the law to keep out of the way.

Exceptional cases may be imagined; and where the rule could not be followed without defeating the end for which it was established, or without producing the mischief which it was the design of the rule to avert, of course it would not be applicable, and, in such a case, a departure from it would be both justifiable and commendable.

But this not being such a case, the steamer must be responsible for the loss occasioned by the collision.

The cases decided by this court referred to.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

The case is fully stated in the opinion of the court.

It was argued by *Mr. Potter* for the appellants, and by *Mr. De Forest* for the appellee.

In cases of collision, it is difficult to make an abstract of the arguments of counsel, because the whole evidence is before the court, and resorted to by both sides in support of the positions which they respectively take. The reporter can only state the points which were made, without the arguments to sustain them.

On the part of the appellants, it was contended :

1. The collision was caused by the brig. She changed her course, and ran into the steamer.

2. But if it be considered that the brig did not change her course, still she ran into the steamer while endeavoring to get out of her way, when she could easily have avoided it.

3. In any event, the steamer was not in fault, every effort on her part being used to avoid the collision.

4. There are two points on which the proofs differ. 1. The general course of the brig. 2. The time the brig showed a light previous to the collision. Both these are assumed, by the decree, to be as claimed by the libellant. Now it is, we think, mathematically demonstrable that, if these matters are as claimed, a collision could not have occurred.

5. The libellant has the burden of proof. To recover, he must make it appear that the steamer was in fault, and not leave the question of fault in doubt.

6. In any event, the damages were excessive. The libellant was only entitled to the actual damage caused by the collision, viz: the cost of bringing the brig into port and refitting her.

The counsel for the appellee made the following points :

1. The steamer's course was east half south at the time the brig's light was reported. The wind was free for the steamer; all her sails and studding-sails were set; her speed was about 12½ knots.

2. There is a slight disagreement among the witnesses as to the direction of the wind, but the difference is not material.

3. The brig was sailing on the wind, northwest by west, close hauled, on the larboard tack, her track converging toward that of the steamer, and her speed about three to four knots

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball*

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4. The position of the brig, when her light was first discovered, was somewhat to the southward of the original track of the steamer.

5. There is no substantial difference between the witnesses as to the state of the atmosphere and weather, at the time of the collision. The night was not unusually dark, and the atmosphere not thick.

6. It appears very clearly, from the testimony on both sides, that the vessels were several miles apart when the light of the brig was first displayed. This is proved directly, and is to be inferred from various independent facts.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal in admiralty, from a decree of the Circuit Court of the United States for the southern district of New York, in a cause of collision, civil and maritime. It was commenced in the District Court on the twenty-fourth day of September, 1851, by the appellee, in behalf of himself and the other owners of the brig "Alfaretta." According to the case made in the libel, the *Alfaretta* sailed from Millbridge, in the State of Maine, on the tenth day of August, 1851, fully laden with lumber ou freight, and bound on a voyage to the port of New York. She was a tight, stanch, strong vessel of one hundred and sixty-three tons burden, and in every respect well manned, tackled, appparelled, and appointed, with a competent master, and sufficient crew; and was totally wrecked by the collision which occurred on the sixteenth day of the same month, without any fault of her officers or crew, and while she was lawfully pursuing her voyage from the place of departure to her place of destination. At the time of the disaster she was fifteen or twenty miles off the southern shore of Long Island, sailing close hauled on the wind, with her larboard tacks aboard, and all her sails set, and was heading about northwest by west. While sailing on that course, with a light wind from southwest by west, her master and crew discerned a light bearing from them about west half south, which they judged to be the light of a steamer; and the libellant, who was the master of the *Alfaretta*, immediately caused a light to be hoisted in



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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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the fore rigging of the brig. That vessel proved to be the steamship Pacific, and it is alleged that she had such a large number of lights that the libellant was not able to determine what direction she was steering, and kept his vessel on her course, without any deviation, until the collision took place. It occurred between eight and ten o'clock in the evening, as alleged in the libel, and about fifteen minutes after the light was placed in the fore rigging of the brig, when the steamer, with great force and violence, ran into and struck the brig on her larboard bow, cutting her down to the water's edge, and carrying away her foremast, so that she filled in a few minutes and became a complete wreck.

On the fourteenth day of October following, the claimants of the steamer filed their answer to the allegations of the libel. Among other things not necessary to be noticed, they deny that the steamer had such a large number of lights at the time referred to, that the libellant was not able to determine what direction she was steering; and they also deny that the brig kept her course, without any deviation, until the collision occurred; or that the steamer ran into and struck the brig in the manner above stated. Their theory is, and they accordingly allege that the steamer started from New York on the day of the collision, on her intended voyage to Liverpool, well manned and equipped for the voyage, and in every respect seaworthy; and that the look-out of the steamer, who was stationed at the forecastle, while she was proceeding on the voyage, between seven and eight o'clock in the evening, the weather being cloudy and the night dark, the wind southwest by south, and the steamer steering east half south, with her usual lights displayed, discovered the light of a vessel about two and a half points on the starboard bow of the steamer. Whereupon the helm of the steamer was immediately put to the starboard, and she at once swung off to east-northeast, and at or about the same time her engines were stopped. That vessel so discovered was the brig *Alfaretta*. She was close hauled on the wind at the time, and was steering to the westward, as the respondents allege, in a course nearly parallel to that of the steamer; but, instead of keeping her course, as she should have done,

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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she suddenly and unexpectedly put her helm to port, and kept off, and came with her bows on to the steamer, striking her a little forward of her starboard wheel, which passed over the bows of the brig, cutting her down and damaging the steamer to the amount of two thousand dollars. And they explicitly allege, that if the brig had kept her course, and had not put per helm to port, the collision would have been avoided. This statement, derived from the pleadings, exhibits very fully the real nature of the controversy between the parties, and the grounds assumed on the one side and the other in the prosecution and defence of the suit. Testimony was taken on both sides, in the District Court, and, after hearing, a decree was entered that the libel be dismissed, each party paying their own costs, and the libellant appealed to the Circuit Court. Both parties appeared by counsel in the Circuit Court, and, after a full hearing, it was ordered and adjudged that the decree of the District Court dismissing the libel be in all things reversed, and that the libellant do recover the damages sustained by reason of the collision, together with costs in both courts, and that the cause be referred to a commissioner to ascertain and report the damages. Additional testimony was taken before the commissioner, who reported that the sum of seven thousand one hundred and seven dollars and nineteen cents was due to the libellants, to which report the respondents excepted; and, after the hearing upon the exceptions, the report was confirmed by the court, and a decree entered that the libellant recover the sum reported with costs. Whereupon a final decree was entered, in pursuance of the report, and the respondents appealed to this court. Many of the facts and circumstances attending the disaster, as well as those which preceded it, are so fully proved that they cannot properly be regarded as the subject of dispute. As alleged in the libel, the collision took place in the open sea, on the sixteenth day of August, 1851, some fifteen or twenty miles off the southern shore of Long Island. It occurred a little past eight o'clock in the evening, after the officers in charge of the respective vessels had been fully apprised of the approaching danger, and under circumstances which make it manifest that it ought to have

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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been prevented. Both vessels had proper lights at the time, and competent and sufficient look-outs; and it is clearly proved that the duties of the look-outs were vigilantly and promptly performed. Lights had not been set on the brig when her look-out first discerned the light of the steamer from the forward part of the vessel. One had been prepared, however, and lighted by the steward, and was in the galley forward of the house on the deck, ready for that purpose. On seeing the light of the steamer, the look-out of the brig at once reported the fact to the master, who was then walking the deck, and he immediately caused the light, which was burning brightly, to be hoisted in the fore rigging of the brig, and it was kept there, in full view of the approaching steamer, until the vessels came together. Coffin, who hoisted the light, and was the look-out on the brig, testifies that he tied the light just under the fore-yard, and remained standing in the rigging, watching the light of the steamer as she approached, until she was so near that he had just time to descend to the deck and take a few steps aft when the vessels struck. He says it was about fifteen minutes after he reported the light of the steamer to the master of the brig that the collision occurred; and, in this particular, he is strongly confirmed by the mate of the steamer, who admits that the brig was about three miles distant when her light was reported to him, as the officer of the deck, by the look-out on the starboard bow of the steamer. At the time the light of the steamer was first seen by the look-out, the brig was sailing on a course of northwest by west, close hauled on the wind, with her larboard tacks aboard, and all her sails set. She was converging towards the track of the steamer, and was going through the water only three or four miles an hour, the wind being light, and blowing from the southwest by west.

Several witnesses describe the character of the night as overcast, and some speak of it as cloudy, with intervening stars; but all agree that it was not unusually dark. They all concur in saying that the surface of the sea was smooth, and there was no haze or mist on the water; and the mate of the steamer testifies that objects could be seen without lights at the distance of three miles.

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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When the steamer discovered the brig, she had all her signal lights displayed, and was on a course of east half south, and was moving through the water at the rate of twelve or thirteen miles an hour, using all her sails as well as her engines. Her mate and look-out first saw the light of the brig, and they testify that the bearing of the light was some two and a half points off the starboard bow of the steamer. Their statements, however, do not entirely agree with the testimony of the master. He was in his room at the time, calculating the position of the steamer, and did not hear the light of the brig reported. While there, he heard the mate call out, "hard a-starboard," and instantly went up on to the paddle-box of the steamer.

His account of the bearing of the brig is not entirely clear, as given in the record, or very satisfactory. At first, he says he saw the brig two and a half to three points off the starboard bow of the steamer, but finally fixes it at two points; and adds, to the effect that she was not over one-third of a mile distant. He admits, however, that the steamer was then swinging off rapidly towards Long Island shore; and of course, if the bearing was only two points when the master reached the paddle-box, it must have been much less than two and a half points at the time the light was first discovered, as the vessels were then three miles apart, and the order of the mate, to starboard the helm, had not then been given; and of course the steamer did not commence to swing off to port till after that order was given and executed.

According to the testimony of the mate, his first order, after seeing the light of the brig, was to starboard the helm, and then, he says, the vessel began to swing off; and it was not until after he left the position he then occupied, and went on to the paddle-box, that he gave the order, hard a-starboard. After that order was given, and the usual response received from the wheelsman, then, he says, the master came by his side, and repeated the order, adding that "the vessel will be into us—stop her;" and the mate says that the steamer had then swung off about three points; and yet the master says that the bearing of the light of the brig was still two points off the starboard bow of the steamer.

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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Statements so conflicting and uncertain do not furnish any definite elements which can safely be made the basis of a reliable mathematical calculation as to the precise bearing of the brig when her light was first seen, and are not entitled to much consideration in determining the question how the collision was produced.

Some uncertainty also exists as to the precise bearing of the steamer when her light was first discovered from the brig. It is stated in the libel as about west half south, and the testimony of the witnesses is equally indefinite. One witness estimates it at about three points off the larboard bow of the brig; another says it was about two points in the same direction; and a third witness says it was about west. Such indefinite statements cannot afford much aid in determining the principal question involved in this controversy.

Whatever may have been the precise position of the vessels with respect to each other at the time the light of the steamer was first discovered by the look-out of the brig, it is certain that the course of the brig was converging towards the track of the steamer, and that they came together in the course of fifteen minutes after the light was reported to the master; and the brig was run down and lost. It was the starboard bow of the steamer which came in contact with the larboard bow of the brig, forward of the fore-swifter, and slewed her round, carrying away her bowsprit, foremast, and main-topmast, and cutting her down to the water's edge; and such was the headway of the steamer at the time, that she swept on for a considerable distance, without any apparent abatement of her speed, notwithstanding her engines were stopped and reversed just before the collision took place.

All the circumstances tend to show that the disaster might have been prevented, and that there was fault somewhere, for which the offending party ought to be held responsible. Both parties appear to have so understood the matter when they made up their pleadings, as well as in the subsequent conduct of the cause.

It is alleged in the libel that the brig kept her course after the light of the steamer was seen, without any deviation, until

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*New York and Liverpool U. S. Mail Steamship Co. v. Eumbell.*

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the collision occurred. On the part of the respondents, that allegation in the libel is denied; and they allege that the brig, when her light was first seen, was steering to the westward, close hauled on the wind, and in a course nearly parallel to the steamer; but instead of keeping her course, as she should have done, that she suddenly and unexpectedly put her helm up, kept off, and came with her bows on to the steamer.

Such is the issue, as made up by the parties in the pleadings, and it presents the principal question of fact to be determined by the court.

Our views upon the point cannot be stated in a manner which would be satisfactory to those interested, without some brief reference to the evidence on which they are based.

When the disaster occurred to the brig, her whole company, consisting of seven men, including the master and mate, were on the deck of the vessel, and witnessed the events. Four were examined as witnesses; and the mate testifies that it was the watch of the master, who, being the libellant and one of the owners of the vessel, was not examined. His watch commenced at eight o'clock in the evening, when the preceding watch closed. From six to eight o'clock, the mate had charge of the deck, and he says that the course of the brig at sunset was northwest by west; that she was sailing close hauled on the wind, and continued on the same course until eight o'clock, when he went below. He remained below until he heard a light reported, when he immediately went on deck, and at first saw only one light, but, as the vessel approached nearer, he saw more, and supposed it was a steamer; and he testifies positively that the brig did not change her course, after he went on deck, until the steamer struck her. On his return to the deck, he did not look at the compass, but says the brig was on the wind, with her larboard tacks aboard, and, in his judgment, was going the same course as when he went below.

Three of the seamen were also examined, and their testimony is equally full and explicit, and to the same effect. One of them was the look-out, who first discovered the light of the steamer, and reported it to the master; and the other two, on hearing his report, immediately went on deck, and remained

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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throughout, watching the light as it approached, and with every opportunity to see and observe whatever transpired on the deck of the vessel. Some one or more of them testifies that the master twice gave the order "to keep her full and by," as the steamer advanced, and they all concur that the brig did not change her course, and that no danger was apprehended until just before the collision took place. All must admit that they had ample means of knowledge upon the subject of their testimony; and if their statements are incorrect, they must have wilfully perverted the truth, which is not to be presumed. Several witnesses, however, examined on the part of the respondents, testify that the brig did change her course before the vessels came together; and among the number is the mate of the steamer, who beyond doubt describes the events truly, as they appeared to him at the time of the occurrence.

His testimony, as it is exhibited in the record, furnishes conclusive evidence that the two vessels were very close together, if not in actual contact, when the supposed change of course was made, and presents some ground of inference that the jib-boom of the steamer, or the rigging connected with the bowsprit, as they swept over the stem of the brig, or pressed against her fore rigging, may have produced the state of things which induced him to think that the brig had ported her helm. At first he said the change was made just before the collision, then immediately before it; but, upon further interrogation, he said it was before the jib-boom of the brig had touched the steamer, and finally added that the brig might have been twice the length of the ship off. All of his statements, however, are based upon the theory that the brig ran into the steamer, when it is satisfactorily shown that the real state of the case was the reverse. It was the bow of the steamer, near the cat-heads, which struck the jib-boom of the brig, and carried it away; and the evidence furnishes strong reasons to conclude that the brig had been partly slewed round just before that occurred. Be that as it may, it is certain from the evidence that the brig kept her course until just before the collision took place. When the mate of the steamer first saw her light, he says it was about three miles distant, and he admits that her direction then was

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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north of west, and that he did not notice any change of her course, except the one already mentioned, when the vessels were close together. When the master went up on to the paddle-box of the steamer, and repeated the order previously given by the mate to put the helm hard a-starboard, he says the brig was then sailing close hauled on the wind, and that the two vessels were not more than a third of a mile apart. His account of the change of course is, that it was made after that order was given, and he says the brig instantly turned directly across the bows of the steamer, and came right into her, thus showing conclusively that the alleged change, however produced, was made at the moment of collision. These references to the testimony of the witnesses must suffice, and they are believed to be amply sufficient to show what the state of the evidence is, as it is exhibited in the record. One remark is applicable to all of the witnesses introduced by the respondents; and that is, they had not the same means of knowledge respecting the matter in dispute as the witnesses for the libellant possessed, who had charge of the brig, and governed her course; and in weighing the evidence, and determining its force and effect, that important consideration cannot be overlooked. It must be admitted that the witnesses on the part of the libellant speak from actual knowledge, and, unless they have wilfully stated what they know to be false, their statements must be correct. They were on the deck of the vessel, interested, so far as their personal safety was concerned, to observe everything that transpired as the steamer approached, and they cannot well be mistaken in respect to the matter under consideration.

Those on board the steamer appear in the record under very different circumstances. They only infer what they have affirmed as to what transpired on the deck of the brig, and at best their statements respecting the matters in question are of the nature of opinions. and it is not difficult to see that they may be in error. In the excitement and confusion of the moment, they may have mistaken what was occasioned by the momentum of the steamer or the pressure of her bowsprit or jib-boom upon the stem or fore rigging of the brig, for a change of course pro-



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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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duced by an alteration of her helm. All the testimony tends to show that the two vessels came together at an obtuse angle, and there is much reason to think that the brig had been pressed out of her course before the bows of the vessels came together. At all events, such an inference from the evidence is far more reasonable than would be the conclusion that all the witnesses for the libellants have wilfully perverted the truth. Other grounds of reconciling the testimony consistent with the integrity of all the witnesses might be suggested, but we think it unnecessary, as the evidence clearly shows that the brig kept her course, without any change whatever, until the peril was impending and the collision inevitable.

An error committed by those in charge of a vessel under such circumstances, if the vessel was otherwise without fault, would not impair her right to recover for the injuries occasioned by the collision, for the plain reason that those who produced the peril and put the vessel in that situation would be chargeable with the error, and must answer for the consequences.

Our conclusion, however, on this branch of the case, is, that the respondents have failed to support the allegation of the answer, that the brig changed her course after the light of the steamer was discovered, and that the evidence satisfactorily shows that she did not change her course in any sense which can be regarded as a fault. Sailing vessels when approaching a steamer are required to keep their course; and steamers, under such circumstances, as a general rule, are required to keep out of the way. Many considerations concur to show that all those engaged in navigating vessels upon the seas are bound to observe the nautical rules recognised and approved by the courts, in the management of their vessels on approaching a point where there is danger of collision. Those rules were framed and are administered to prevent such disasters and to afford security to life and property exposed to such dangers; and public policy, as well as the best interest of all concerned, requires that they should be constantly and rigidly enforced in all cases to which they apply. Few cases can be imagined where it is more needful that they should be observed than when a steamer and a sailing vessel are approaching each other from opposite

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*New York and Liverpool U. S. Mail Steamship Co. v. Rumball.*

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directions, or on intersecting lines, for the obvious reason that the negligence of the one is liable to baffle the vigilance of the other; and if one of the vessels under such circumstances follows the rule, and the other omits to do so, or violates it, a collision is almost certain to follow.

Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description, while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision. Sailing vessels approaching a steamer are required to keep their course on account of the correlative duty which is devolved upon the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided, and may not be led into error in her endeavor to comply with the requirement.

Under the rule that a steamer must keep out of the way, she must of necessity determine for herself and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left, or to stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required in the admiralty jurisprudence of the United States that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty and fulfil the requirement of the law to keep out of the way.

Repeated decisions of this court have affirmed the doctrine here laid down, and carried it out to its logical conclusion, and in so many instances that the question cannot any longer be regarded as open to dispute. Accordingly, it was held in the case of the steamer *Oregon v. Rocca et al.*, (18 How., 570,) that

when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions to avoid a collision; and if this be not done, *prima facie* the steamer is chargeable with fault. That decision was founded upon the rule previously established in *St. John v. Paine et al.*, (10 How., 588,) where the whole subject is elaborately considered, and the reasons of the rule fully explained. Similar views are also maintained in the case of the *Genesee Chief*, (12 How., 461,) and in various other cases to the present time. Exceptional cases may be imagined in a crowded thoroughfare, where the rule would not be applicable, but those will be considered when they arise. Such precautions as are inculcated in the rule referred to are enjoined, as before remarked, to prevent collision and afford security to life and property; and in a case where the rule could not be followed without defeating the end for which it was established, or without producing the mischief which it was the design of the rule to avert, of course it would not be applicable, and in such a case a departure from it would be both justifiable and commendable. Extreme cases, such as are supposed, will rarely if ever occur, and in referring to them it must not be understood that the rule will be relaxed to any extent whatever in other cases to which it properly applies.

Applying these principles to the case under consideration, it is obvious what the result must be. It is not denied that the collision took place, and that the brig was run down and lost; and such being the fact, and the evidence exhibited failing to satisfy the court that the brig was in fault, or the disaster inevitable, it necessarily follows that the collision was the result of fault on the part of the steamer, and that the steamer is answerable to the libellant for the damage.

Our attention was also drawn, at the argument, to the amount of the damage as reported by the commissioner, and it was insisted that it is excessive. On that point it will be sufficient to say, that after a careful examination of the testimony before him, we see no ground to doubt that his duty was rightly performed.

The decree of the Circuit Court, therefore, is affirmed, with costs.

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*Montgomery et al. v. Anderson et al.*

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**JOSEPH E. MONTGOMERY ET AL., CLAIMANTS OF THE STEAMER  
REPUBLIC, &C., APPELLANTS, v. JOHN J ANDERSON ET AL.**

Where the District Court of the United States, sitting in admiralty, decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, this was not such a final decree as would justify an appeal to the Circuit Court.

The Circuit Court, therefore, had no jurisdiction, and its judgment, affirming the decree of the District Court, and remanding the case to that court, was erroneous. Moreover, if it had jurisdiction, it was not authorized to remand the case to the District Court. The appeal had carried up the fund, and the Circuit Court should have executed its own decree.

An agreement of counsel, filed in this court, stating that the whole fund had been distributed, will not correct the error. This court has heretofore decided that consent of counsel will not confer jurisdiction.

The decree of the Circuit Court must be reversed, and the case remanded to that court, with directions to dismiss the case for want of jurisdiction.

THIS was an appeal from the Circuit Court of the United States, sitting in admiralty, for the district of Missouri.

The case is stated in the opinion of the court.

It was argued by *Mr. Polk* for the appellants, and *Mr. Rankin* for the appellees.

Mr. Chief Justice TANEY delivered the opinion of the court.

The appellees in this case filed a petition in the District Court of the United States for the eastern district of Missouri, stating that they had, by the laws of Missouri, a lien on the steamboat Republic for \$2,000, which they had loaned to the clerk of the boat to purchase supplies and necessities, in order to enable her to proceed on a voyage from St. Louis to New Orleans; that the vessel, at the time the petition was filed, was under seizure in the district, in a case of admiralty and maritime jurisdiction, and had been ordered by the court to be sold; and the petitioners prayed that they might be permitted to intervene for their interest, and paid out of the proceeds when the steamboat was sold.

The appellants answered, stating that they were owners of

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*Montgomery et al. v. Anderson et al.*

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seven-eighths of the vessel, and denying that the money was needed or used for supplies; and insisting that the boat is not liable for it, and that it is not a lien by the laws of Missouri.

The petition was filed on the 3d of June, 1857, and the vessel, it appears, was sold by the marshal, upon the seizure mentioned in the petition, and the sale reported and the proceeds paid into the registry of the court on the 23d of the same month. The proceeds amounted to \$26,250. Further proceedings were had on the petition of the appellees, and testimony taken; and on the 7th of September, in the same year, the District Court decreed that the sum claimed by the petitioner was due, with interest and costs, and a lien on the Republic, and referred the matter to the commissioner of the court to compute and report the amount due.

The commissioner accordingly made his report, stating the amount due, for principal and interest on the sum loaned, to be \$2,034. This report was confirmed by the court; and thereupon the court passed a decree, adjudging that there was due from the fund then in court, to the petitioners, the sum of \$2,034, and to bear interest from that day; but that, inasmuch as some of the causes against the Republic had not then been determined, and the fund in court might not be sufficient to satisfy all of the claims that might be established against the vessel, no order for the payment of the money would be made by the court until it should be further advised in the premises.

The present appellants thereupon prayed an appeal to the Circuit Court for the district of Missouri, which was granted; and further proceedings took place in the Circuit Court, and further testimony was taken. And, at the October term, 1857, the decree of the District Court was affirmed, and the case remanded to the District Court to carry out this decree; and from this decree the appellants prayed an appeal to this court.

This is substantially the case, as it appears on the transcript from the Circuit Court. We do not now speak of the admissions filed here, which we shall presently notice. But, upon the transcript itself, it appears that there was no final decree in the District Court, upon which an appeal would lie to the Circuit Court. No final disposition of the fund in the registry.

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*Montgomery et al. v. Anderson et al.*

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Indeed, it was not final even as to the amount in controversy between these parties; for the amount to be awarded to the appellees was made to depend upon the amount of other claims upon the fund, which were then depending before the District Court. And, under the act of Congress, no appeal would lie from the District to the Circuit Court until there was a final decree upon the whole case—that is, not until all the claims on the money in the registry had been ascertained and adjusted, and the whole amount of the proceeds of the sale of the vessel distributed, by the decree, among the parties which the District Court deemed to be entitled, according to their respective priorities and rights.

The Circuit Court, therefore, had no jurisdiction of the case, as it came before them; and their judgment, affirming the decree, was erroneous on that ground. The appeal ought to have been dismissed for want of jurisdiction. This point was directly decided in this court, in the case of *Mordecai and others v. Lindsay and others*, (19 How., 200.)

But if the appeal had been regularly before the Circuit Court, it was not authorized to remand the case to the District Court, to carry into execution its decisions. The appeal carries up the *res*, or money in the registry, of the District Court, to the Circuit Court; and when the rights of the parties are adjudicated there, the court must carry into execution its own decree.

In order to cure these defects in the record, an agreement has been filed in this court, in which they admit that the whole fund has been finally disposed of by the Circuit Court among the claimants, with the exception of the sum in controversy between these parties. And they move to amend the record here according to this agreement.

But, in the case of *Mordecai and others v. Lindsay and others*, above referred to, a similar motion was made to amend the record here, upon a like agreement. But the court decided that, as the defect of jurisdiction in the Circuit Court appeared upon the transcript, it could not be cured by an amendment in this court, because consent cannot give jurisdiction, nor legalize jurisdiction exercised without the authority at law. The rule laid down in that case must govern this.

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*Ballance v. Forsyth et al.*

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The decree of the Circuit Court must therefore be reversed, and the case remanded to the court, with directions to dismiss the appeal for want of jurisdiction. The District Court can then proceed to pass a final decree, if that has not been already done; and from that decree any party who may think himself aggrieved may appeal to the Circuit Court, and from the final decree of that court to this, where the sum in controversy is large enough to give jurisdiction to the respective courts upon such appeals.

This view of the subject makes it unnecessary to examine whether the amount in controversy between the parties in this appeal is over \$2,000; for their respective rights have not been judicially decided upon in the Circuit Court, for want of jurisdiction, as above stated, when it acted upon the controversy.

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**CHARLES BALLANCE, APPELLANT, v. ROBERT FORSYTH, LUCIENNE DUMAIN, AND ANTOINE R. BOUIS.**

The court again decides that consent of parties cannot give jurisdiction to this court where the law does not give it; but leave is granted to the plaintiff in error to withdraw the transcript, and use it so as to bring his case legally before this court.

THIS was an appeal from the Circuit Court of the United States for the northern district of Illinois.

It was dismissed, and a motion made to reinstate it, under the circumstances stated in the opinion of the court.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case was dismissed on the 20th of December last, because it did not appear that an appeal had been taken in the District Court. A motion has now been made to reinstate the case, and, in support of that motion, a written agreement, signed by the counsel for the appellant and appellee, has been filed, consenting to reinstate the case, to waive all irregularities, and to try the case on the merits.

But the consent of parties cannot give jurisdiction to this

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*Mason v. Gamble et al.*

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court, where the law does not give it. And, without an appeal taken in the District Court, this court has no jurisdiction, and the consent of parties cannot cure the defect. The motion is therefore overruled.

But if the plaintiff in error desires to supply the omission, and take an appeal in the District Court, and bring his case legally before us, he has leave, in order to save expense, to withdraw the transcript now filed, and to use it upon his appeal, leaving a receipt for it with the clerk of this court.

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**JOHN T. MASON, PLAINTIFF IN ERROR, v. JOSEPH C. GAMBLE AND DAVID GAMBLE.**

The act of Congress passed on the 3d of May, 1844, (5 Stat. at L., 658,) authorizes a writ of error, at the instance of either party, upon a final judgment in a Circuit Court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due, without regard to the sum or value in controversy.

But this law does not include a case where an action was brought against the collector for the return of duties paid under protest, and where the recovery was for a less sum than two thousand dollars.

Such a case must be dismissed for want of jurisdiction

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Maryland.

The case is stated in the opinion of the court.

A motion was made by *Mr. Campbell* to dismiss the writ of error for want of jurisdiction, which was opposed by *Mr. Black*, (Attorney General.)

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made to dismiss this case for want of jurisdiction, upon the ground that the sum in dispute does not exceed \$2,000.

The case is this: The plaintiff in error is the collector of the port of Baltimore, and, as such, demanded a certain amount of duties on goods imported by the defendants in error, which they believed was greater than the amount imposed by law



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*Richmond v. City of Milwaukee.*

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The duties demanded were paid under protest, and this suit was brought to recover back the amount alleged to be overpaid. At the trial, the jury, under the instruction of the court, found a verdict in favor of the defendants in error for the sum of \$198.88, upon which a judgment was entered against the collector; and this writ of error is brought on that judgment.

The act of Congress which is supposed to give jurisdiction in cases of this description is the act of May 31st, 1844, (5 Stat., 658.) This act authorizes a writ of error, at the instance of either party, upon a final judgment in a Circuit Court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due, without regard to the sum or value in controversy. And it is true, that the same reasons which induced the Legislature to give the writ of error in the cases mentioned in the law, apply with equal force to suits against a collector to recover back duties which he alleged to be due, and had already collected. The questions are of the same character, and the interests of the United States the same in either case. And it is most probable that suits against the collector were omitted in the act of Congress by some oversight or accident.

But, however that may be, the writ of error is authorized in those cases only in which the United States are plaintiffs in the suit. The language of the law is too plain to admit of doubt, and the words cannot by any reasonable or fair construction be extended to suits brought by the importer against the collector; and as the sum or value in controversy does not exceed \$2,000, and the case is not provided for by the act of Congress referred to, the writ must be dismissed for want of jurisdiction in this court.

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**DEAN RICHMOND, APPELLANT, v. THE CITY OF MILWAUKIE AND  
FERDINAND KUEHN.**

After a case has been heard and dismissed for want of jurisdiction, because it did not appear that the value of the property in controversy exceeded two thousand dollars, affidavits of its value come too late.

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*Richmond v. City of Milwaukee.*

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The cases upon this point examined

Moreover, the value of the property is stated in the proceedings of the court below, and affidavits have never been received here to vary it or enhance it in order to give jurisdiction.

**THIS** case was before this court at a preceding day of the term. (See page 80 of the present volume.)

*Mr. Gillet*, of counsel for appellant, moved to reinstate the case, and filed an affidavit of Alexander Mitchell, stating the property to be worth twenty-five hundred dollars, and also an admission by Mr. Woodward (city attorney) that it was worth that amount.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case was dismissed at a former day of the present term, because it did not appear that the value of the property in controversy exceeded \$2,000. An affidavit has now been filed on the part of the appellant, stating that the property was worth \$2,500; and a motion thereupon made to reinstate the case, to which the counsel for the appellees assent.

There are cases—such, for example, as an ejectment, or a suit for dower—in which the value does not, according to the usual forms of proceeding, appear in the pleadings or evidence in the record. In such cases, affidavits of value have been received here, in order to show that the value is large enough to give jurisdiction to this court. That was the case in *Course v. Steadman* and others, referred to in the 13th rule of this court. The case is reported in 4 Dall., 22. It was a proceeding to charge a tract of land with a lien created by a judgment; and, as the decree was against the respondent, it was necessary for her to show that the land was worth more than \$2,000, in order to support the appeal. The case of *Williamson v. Kincaid*, referred to in the above-mentioned case, (4 Dall., 19,) was an action for dower. But in both of these cases the affidavits were filed before the argument on the merits; and in *Bush v. Parker*, (5 Cr., 257,) Mr. Justice Livingston expressed his opinion strongly against giving time to file affidavits of value, and the court refused to continue the case for

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*Porter et al. Foley.*

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that purpose. And in the class of cases above mentioned, in which affidavits are received, there is no instance in which a case has been postponed or reinstated, in order to give the party time to produce affidavits of value. Indeed, such a practice would be irregular and inconvenient, and might sometimes produce conflicting affidavits, and bring on a controversy about value, occupying as much of the time of the court as the merits of the case.

And if this case were one of those in which affidavits could be received, they come too late after the case has been heard and dismissed for want of jurisdiction. But it is not a case of that description. The value of the lots about to be sold for corporation taxes was involved directly in the dispute. Their value is stated in the bill, and the amount of taxes imposed upon them, in order to show that the overcharge made by the corporation was unreasonable and oppressive; and their value is stated by the complainant to be "over \$500"—the sum mentioned being only one-fourth of the amount required to give jurisdiction to this court; and where the value is stated in the pleadings or proceedings of the court below, affidavits here have never been received to vary it or enhance it, in order to give jurisdiction. And the affidavit now offered could not have been received, even if filed before the argument of the case.

The motion to reinstate is therefore overruled.

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**JAMES D. PORTER ET AL., PLAINTIFFS IN ERROR, v. BUSHROD W. FOLEY.**

This court has already decided at the present term (see page 195 of this volume) that a writ of error made returnable on the third Monday in January, and the defendant in error cited to appear on that day, is irregular, and must be dismissed.

A motion to remand the case to the court below, with leave to amend the writ of error and citation, cannot be granted. But if the plaintiff in error desires it, he may, in order to save expense, withdraw the transcript, and use it in connection with the proper and legal process to bring the case here.

THIS case was brought up from the Court of Appeals of

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*Martin v. Ihmsen.*

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Kentucky by a writ of error issued under the 25th section of the judiciary act.

A motion was made to dismiss the writ, upon the ground stated in the opinion of the court.

Mr. Chief Justice TANEY delivered the opinion of the court.

The writ of error in this case was issued on the 27th day of December last, and made returnable on the third Monday in January, and the defendant in error cited to appear on that day.

It has already been decided at the present term, in the case of Insurance Co. of the Valley of Virginia v. Mordecai, that such a writ of error cannot be supported, and does not bring the case before the court.

A motion has been made, on behalf of the plaintiff in error, to remand the case to the court below, with leave to amend the writ of error and citation. But, as the transcript stands, there is no case before us in which we can exercise a power of amendment. We can do nothing more than dismiss it for want of jurisdiction.

But if the plaintiff desires it, he may, in order to save expense, withdraw the transcript, and use it in connection with the proper and legal process to bring the case here; and if withdrawn, a receipt for it must be left with the clerk.

But as it now stands, it must be dismissed for want of jurisdiction.

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FRANCIS MARTIN, ADMINISTRATOR OF DENNIS T. DONOVAN,  
DECEASED, PLAINTIFF IN ERROR, v. CHRISTIAN IHMSEN.

In Pennsylvania, where a transfer of certain accounts was made, the assignee had only an equitable interest, and could not sue in his own name. But when the suit was brought in Louisiana, where there is no distinction between a legal and equitable title, he could maintain the suit in his own name, and the assignment was good evidence.

An exception taken to the refusal of a judge to sign a bill of exceptions, under the circumstances of this case, requires no further notice.

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*Martin v. Ihmsen.*

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The ruling of the court below, viz: that prescription was interrupted by a litigation which was pending between the parties shortly before the present suit was instituted, was, under the circumstances of the case, correct.

THIS case was brought up by writ of error from the Circuit Court of the United States for the eastern district of Louisiana.

The case is explained in the opinion of the court.

It was argued by *Mr. Gillet* for the plaintiff in error, and *Mr. Benjamin* for the defendant.

Mr. Justice GRIER delivered the opinion of the court.

Donovan was defendant below in an action for a balance of accounts claimed as due by him to the firm of Owen & Ihmsen. This claim had been transferred by that firm to one Frederic Lorenz, and, after his death, transferred to Ihmsen, the plaintiff below.

The cause was tried, by consent of parties, without the intervention of a jury; consequently, the exceptions to the admission of testimony are irregular, and need not be particularly noticed. Besides, we can see no good ground of objection to the evidence of confessions and admissions of a party, consisting of accounts rendered in a former controversy on the same subject, before arbitrators. The award itself was not received by the court as evidence of the amount of debt due, because it had been set aside for some irregularity.

The objections to the admission of the paper showing the transfers of the account were equally without foundation. By the law of Pennsylvania, where these transfers were made, Ihmsen would have an equitable interest in the account; but in that State the mere equitable assignee of an account would not sue in his own name, such *chase in action* not being assignable at common law. There the suit would have been brought in the name of Owen & Ihmsen, the original creditors, for the use of Lorenz, Ihmsen, or any other person holding the equitable right to the account. But in Louisiana, where, by the rule of the civil law, there is no such distinction between the legal and equitable title, Ihmsen, as equitable owner, could

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*Martin v. Thomson.*

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sustain the suit in his own name, and the assignments admitted to prove his title were properly received.

This case was tried at April term, 1856. The president judge has reported his finding of the facts, and his judgment thereon. Some six months afterward, the defendants below made up a statement of facts, (to which the plaintiff refused his assent,) and presented it to the district judge, and demanded that he should seal a bill of exceptions. This the judge properly refused to do, but signed a bill of exceptions taken to his decision refusing to sign one. This novelty in practice requires no further notice.

The only question of law arising on the facts of this case as reported by the court was on the plea of prescription. On this point, the court gave their opinion as follows:

“Without considering the questions whether the account in this case is an open account, within the meaning of the statute of Louisiana, or whether the statute operates upon demands that were subsisting at its date, our conclusion is, that the proceedings in the fourth District Court, relative to the award, were an interruption of that prescription. There was a suit pending between the parties, the present defendant being the plaintiff, which embraced a portion of the matter of this controversy. It was competent to the defendants, by instituting a demand in reconvention, to bring up the whole of the controversy for a settlement in that suit; and if that had been done, a legal interruption would have resulted within the 3484th, 3485th sections of the civil code. (*Dreggs v. Morgan*, 10 Rob., 120.) This was not formally done on the record, but the parties did, by consent, that which we are bound to consider as having an equivalent value.

“They came to an agreement that arbitrators selected by them should have the power to decide who was the creditor of the contesting parties, to settle finally (‘without appeal’) the amount due on either part, and that the attorney of either party might move for judgment on this award. It is clear, that had the arbitrators proceeded regularly, and a judgment been rendered upon it, that no exception could have been taken to the condition of the pleadings in the pending suit, or that there

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*Combs v. Hodge et al.*

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had not been a demand in reconvention. The consent in the submission agreement implied a waiver of all pleadings of that nature, and was a release of all errors in the preliminary stages of the suit. Donovan appeared in the District Court, and successfully resisted a motion for judgment upon the award rendered. But the code does not require that a suit should be successfully prosecuted to operate as an interruption of prescription. (Trop. de Pres., sec. 561; *Dunn v. Kinney*, 11 Rob., 247; *Baden v. Baden*, 4 Ann., 468.)

We see no error in this statement of the law, and consequently affirm the judgment with costs.

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**LESLIE COMBS, COMPLAINANT AND APPELLANT, v. JOHN L. HODGE, ADMINISTRATOR OF ANDREW HODGE, DECEASED, WILLIAM L. HODGE, AND JAMES LOVE.**

The pleadings in another suit, where the parties were different, and the petition and answer signed by counsel, cannot be resorted to for admissions of the respective parties.

Where certificates of the public debt of Texas were transferable only by the owner, or his legal representative or attorney, and there is no sufficient evidence of the existence of a power of attorney, a mere endorsement in blank by the owner is not sufficient to justify a purchaser in drawing a conclusion that the holder is entitled to sell or discount it.

The difference between this and negotiable instruments explained, and the authorities examined.

But as the circumstances attending the purchase are not well disclosed in the record, the court will remand the case to the Circuit Court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

The chronological history of the case was this:

In 1839, Combs was the proprietor of a large amount of bonds issued by the State of Texas for various sums, which certificates concluded in this way:

“This certificate is transferable by the said Leslie Combs,

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*Combs v. Hodge et al.*

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or his legal attorney or representative, on the books of the stock commissioner only."

Two of these certificates—viz: No. 5219, for five thousand dollars, and No. 5229, for one thousand dollars—were the subjects of the present suit. No notice will be taken in this report of the other bonds.

In 1840, Combs endorsed these certificates in blank, and placed them in the hands of James Love, of Galveston, Texas, for the purpose, as he alleged, of enabling Love to receive payment, which was then expected, but which was not made.

In 1846, one Josiah Lee brought a suit in the Commercial Court of New Orleans against William L. Hodge, to recover back money which he had paid to Hodge for the purchase of Texas bonds. Hodge took defence upon two grounds, viz: 1. That it was supposed that there was a power to transfer in the hands of a Mr. Love, of Galveston, which plaintiff was bound to refer to. 2. That the blank endorsement of the owner authorized plaintiff to write over it the necessary authority. The court, however, gave judgment for Lee against Hodge.

By subsequent legislation of Congress and of Texas, the bonds became payable at the Treasury of the United States, where payment of them was claimed by J. Ledger Hodge, a resident of Pennsylvania, administrator with the will annexed of Andrew Hodge, deceased, in whose name the bonds had been deposited at the Treasury. Whereupon Combs filed a bill against J. L. Hodge, the administrator as aforesaid, William L. Hodge, and James Love. An injunction was obtained to stay the payment of the money until the determination of the suit. The record of the suit in New Orleans and copies of letters were attached to the bill as exhibits.

J. L. Hodge, the administrator, answered that he had no personal knowledge of any of the matters stated in the bill.

William L. Hodge, amongst other matters, said that the bonds had been transferred by Love to Andrew Hodge fairly and for their full value. The Circuit Court dismissed the bill, and Combs appealed to this court.



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*Combs v. Hodge et al.*

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It was argued by *Mr. Bradley* and *Mr. Baxter* for the appellant, and *Mr. Reverdy Johnson, jun.*, and *Mr. Reverdy Johnson, sen.*, for the appellees.

The principal points made by the counsel for the appellant were the following :

I. This is a proceeding in the nature of a bill of interpleader, the Treasury of the United States being the stakeholder. (*Clarke v. Clarke*, 17 How., 321.)

In such a controversy, the parties stand on their respective legal and equitable rights.

II. The appellant is the creditor of Texas, holding the legal title to this scrip, which can pass only in the manner prescribed by the law of Texas, and apparent on the face of the scrip. (*Menard v. Shaw*, 5 Texas Rep., 384.)

The distinction between stocks passing by delivery or assignment, except in a particular mode, and the effect of their assignment in any other mode, is well established. (*Union Bank v. Laird*, 2 Wheat., 251; *Zacharie and others v. Black and others*, 3 How., 513; *Glynn v. Baker*, 18 East., 509; *Gongen v. Melville*, 3 B. and C., 45; 10 E. C. L., 16; *Attorney General v. Diamond*, 1 Crompt. and Jar., 356, 70; *Attorney General v. Hope*, 1 Crompt., Mees., and Ros., 330; *Jame v. Bowens*, 4 Mees. and Wels., 171; *Miller v. Race*, Smith L. C., 250, and notes; *Story Con. of L.*, sec. 383, and notes.)

III. The legal title being in Combs, the appellees have shown no equity in themselves.

IV. Had Love authority to sell?

1. It was argued below that the power was conferred by the endorsement in blank.

2. That such authority is proved by complainant's Exhibit H., in which Love asserts he had a power of attorney.

*As to the power implied from the endorsement.*

1. There is an express limitation on the face of these bonds upon their transferable character. It is not denied that, as between the original parties, an endorsement in blank, for a fair consideration, followed by delivery, would vest in the purchaser an equitable title, which would, upon satisfactory proof,

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*Combs v. Hodge et al.*

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enable him to compel the endorser, in a court of equity, to do everything necessary to effect a complete transfer of his interest. He could sue in his own name in equity alone. His title would be equitable. And it may be conceded that he had an assignable property in the bonds. But he could assign no more than his equity. "The stream could not rise higher than the fountain." The purchaser, therefore, could not, as against the original party, stand in any better condition than the first assignee.

These are familiar general principles, and will be found to be fully sustained in the following cases: *Turton v. Benson*, 1 P. Wm.'s, 496; S. C., 2 Vern., 764; *Davies v. Austin*, 1 Ves., jun., 247, and see the cases collected in the note, [Perkins's Ed.,] 1 Bro. Ch., 484; *Cator v. Burke*, and 3 Bro. Ch., 179; *Davies v. Austin* and others, and notes; *Scott v. Shreeve*, 12 Wheat., 605; and also 17 How., 615.

Undoubtedly, these general principles are subject to certain exceptions; but there are none such in this case. It is not pretended that the purchase was from Combs, and it is obvious they understood his authority was requisite to complete the title. They have failed to show any facts giving rise to an equity other than the actual possession of the bond with Combs's name endorsed upon it; and this alone is wholly insufficient, the object for which that was done having been satisfactorily shown.

2. The statement contained in the letter of Love is introduced by the complainant for the purpose of showing the pretences under which it is supposed the defendant sets up title, and to negative such pretension.

The bill is sworn to, and emphatically states and reiterates that complainant never gave any authority, in any form, to Love, to dispose of the bonds.

And it is a violent invasion of the rules of evidence to say, that when a complainant introduces, by way of exhibits, in his bill, the unsworn statements of his defaulting agent, as to transactions alleged to be fraudulent, and sought to be set aside, and under oath negatives them, he shall be held bound by the very falsehoods he seeks to overthrow, and they shall

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*Combs v. Hodge et al.*

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he taken as proof that his sworn statements are false. The essence of the bill is, that the agent had fraudulently appropriated the bonds to his own use, under the pretence of an authority to sell; and it is to repudiate and discredit this pretended authority that he makes him and his imputed assignee parties defendant, and seeks from them a discovery of the facts. The answer of Love would have been evidence against the complainant. Hodge, upon leave, could have examined him as a witness. Yet he does not answer, and is not examined. The complainant was entitled to his answer under oath; to that extent, it was a bill for a discovery. He was duly summoned, but, being a non-resident, there was no means of compelling his answer. His failure to answer must, so far as he is concerned, be taken as an admission of the allegations of the bill. But if the statement of this letter was true, he could not, and for his own sake would not, have refused, at the instance of an innocent purchaser from him, to have produced the power, and supported it by proof. The pretence in the letter is contradicted in terms, and charged to have been a fraud. To say, then, that it is evidence to prove the authority, is a solecism, and a contradiction in terms of the plainest rules of chancery pleading. If this is out of the case, there is no scintilla of proof to give countenance to the pretence of an authority.

Finally, Combs having the legal title, the whole burden is on the appellees to establish, by satisfactory proof, an equity which will draw to it the legal title. (*Judson v. Corcoran*, 17 How., 612.)

I. That there is evidence that Love had authority from complainant to dispose of these certificates; and if so, there can be no question as to the propriety of the decree.

The ground upon which the judgment rested in the case of "*Lee v. Hodge*," filed as Exhibit E to bill, was, that in that case there was an agreement by defendant for a special power of transfer, which was not obtained; though, had there been no such special agreement, say the court, the blank endorsement standing alone would have weight in the view there

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*Combs v. Hodge et al.*

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urged, that such blank endorsement gave authority to a holder to write over it the necessary power to transfer.

In the case at bar, the blank endorsement does stand alone, (in the sense of being affected by any special agreement,) and the argument based upon it is strengthened by the avowals of the agent as to his power from Combs, appearing in complainant's Exhibit H to bill, which is also made evidence in the cause by agreement.

II. That the possession of these certificates by Love, with complainant's blank endorsement, constituted him, as to third persons, an agent for the general negotiation of the bonds, and complainant cannot limit his liability by special private instructions to the agent, which are not divulged to a "*bona fide*" purchaser for value.

The blank endorsement on the certificates can mean nothing else than authority to Love to place over it the necessary form of power of attorney. As the certificates call for a transfer in person, or under such a power, the Government of Texas would in no event have paid to Love the amount of the certificates, except upon presentation by him of some such authority; and as it is not pretended that, when these certificates were first placed in Love's hands for the purpose indicated in the bill, there was any separate power of attorney given, the endorsement in blank of complainant's name, where the parties were many hundred miles apart, could import nothing else than authority to fill over the name such power as would authorize Love to surrender to the Government, upon receipt of the sums indicated; and *that* would be, equally as to third parties, innocent "*bona fide*" purchasers, without notice of special instructions, power to receive purchase-money, and transfer to them upon the books of Texas. (1 Parsons on Contracts, 39; 1 Peters, 290, Schinmelpennick v. Bayard; 3 Gill, 251, Chesley v. Taylor; 9 Howard, 580, Baldwin v. Ely; Story on Agency, sec. 73, p. 3, sec. 127; 19 Howard, 322, Commercial Ins. Co. v. Union Ins. Co.; 22 Engl. Law and Eq. R., 516, Montague v. Perkins; 10 Cush. Mass. R., 373, Androscoggin Bank v. Kimball; 22 Wendell, 348, Com. Bank of Buffalo v. Kortright; 4 Dow and Ryls, 641, Gorgier v. Mieville—16 E. C.

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*Combs v. Hodge et al.*

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L., 217; Douglass, 683, Peacock v. Rhodes; 1 Bos. and Pull, 648, Collins v. Martin.)

III. If Love's possession of the certificates so endorsed be not, as to third persons, authority to dispose generally of the bonds, yet it was sufficient to have induced a person of ordinary precaution to infer such authority; and if, by the fraud of Love, such party was misled into a "*bona fide*" purchase of the bonds for full value, even a court of law, and *a fortiori* a court of equity, will throw the loss upon the principal who put it into the agent's power to commit a fraud on innocent parties. (Story on Agency, sec. 127; 1 Term R., 12, Fitzherbert v. Mather; 4 Barn. and Ald.; 1 Wookey v. Pole, 6 E. C. L., 323; 22 Eng. Law and Eq., 516, Montague v. Perkins.)

IV. Although the face of the certificates calls for a transfer on the books of Texas by Combs, or his attorney or representative, such clause relates only to the legal title; and if equity supports the appellee's claim, or that of any purchaser under similar circumstances, it would decree that Combs transfer the naked legal title as required by the certificate. (3 Howard, 483, Black v. Zacharie; 22 Wendell, 348, Com. Bank of Buffalo v. Kortright.—See *Chancellor's Opinion*.)

V. But the act of Texas of 1846, (p. 220,) modifies the stringency of the original certificates by authorizing the transfer on the books of the State to be made, not only by the *original holder*, his attorney or representative, but also by his *assignee*—in which position we stand in equity, and can therefore, as against the complainant, in a court of equity, call for a transfer of the bonds.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff filed his bill to establish his claim to two certificates for a portion of the public debt of the Republic of Texas, which had been issued to him in the year 1839, and which were transferable by him, or his attorney, or his representative, only, on the books of the stock commissioner of that State. He avers that these certificates with others were endorsed in blank by him, and sent to the defendant, Love, in Texas, during the year 1840, with authority to receive an an-

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*Cumbs v. Hodge et al.*

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ticipated partial payment, and to obtain other certificates of the same description for the residue. That he did not give to his agent any authority to sell them, or to dispose of them for his own use, and has done no act to defeat his own legal title to them. That Love did not collect any part of the debt, and has failed to return the two certificates in question. That for fifteen years he has been unable to discover who was in possession of them, and has but recently ascertained that they were held by one of the defendants under a claim of title from Love.

He attached to his bill a number of letters of Love, containing admissions of his receipt of the certificates, and of his agency for the plaintiff; and subsequently to the conversion by him of these, he wrote to the plaintiff in extenuation of his conduct, affirming that he had a power of attorney and letters from the plaintiff authorizing him to sell. That he would endeavor to replace the stock, or would give other stock of the same description, and insisted that the liberty he had taken was excusable.

The defendant (Hodge) answered to the bill that these certificates were claimed as the property of the decedent, Andrew Hodge. That he purchased them from Love fairly, and for their full value, and with a firm conviction that he was authorized by a power of attorney, and the blank endorsement of the plaintiff, to dispose of them. The cause was heard upon the pleadings and a decree *pro confesso* against Love.

The record in the District Court at New Orleans in the suit between Love and Hodge, appended to the bill, does not contain evidence applicable to this cause. The parties to that suit were different, and the petition and answer are signed by counsel, and not by the parties, and cannot be resorted to for admissions of the respective parties. (*Boileau v. Rutlin*, 2 Ex., 665.) There is no evidence of the existence of a power of attorney from the plaintiff to Love, except that contained in the letter of Love before referred to. If that statement is at all admissible, it is insufficient to establish the fact. The letter was written in 1844, after Love had violated his obligation as a faithful agent, and in reply to reproaches of the plaintiff. In

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*Combs v. Hodge et al.*

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that letter he promises to restore to the plaintiff these or other certificates. There is no evidence of any fulfilment of this promise. He has failed to produce a power of attorney, or any letters which authorize his sale to his co-defendant. The witnesses of the contract between him and the decedent (Andrew Hodge) have not been examined. These circumstances raise a strong presumption against the verity of his statement, and deprive his letter of any probative force. The title of the defendant therefore depends upon the effect to be given to the endorsement of the certificates in blank by the plaintiff, and their deposit with Love. The question is, was he invested with such a title that a *bona fide* purchaser, having no notice of its infirmity, will be protected against a latent defect? The law merchant accords such protection to a holder of a bill of exchange taken in the course of business for value, and without notice; and legislation in Great Britain and some of the States of the Union has extended to the same class of persons a similar protection in other contracts.

But this concession is made for the security and convenience, if not to the necessities and wants, of commerce, and is not to be extended beyond them. It is a departure from the fundamental principle of property, which secures the title of the original owner against a wrongful disposition by another person, and which does not permit one to transfer a better title than he has. The party who claims the benefit of the exception to this principle must come within all the conditions on which it depends. In the case of bills of exchange that have originated in fraud or illegality, the holder is bound to establish that he is not an accessory to the illegal or fraudulent design, but a holder for value. If the bill is taken out of the course of trade as overdue, or with notice, the rights of the holder are subjected to the operation of the general rule. In *Ashurst v. The Official Manager of the Bank of Australia*, 87 L. and Eq. R., 195, Justice Erle says: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferrer can only pass such title as he had. As to negotiable instruments, during their currency, delivery

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*Combs v. Hodge et al.*

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to a *bona fide* holder for value gives a title, even though the transferrer should have acquired the instrument by theft; but after maturity the instrument becomes in effect a chattel only in the sense I have mentioned." When the instrument is one which by law is not negotiable, or when the negotiability has been restricted by the parties, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an endorsement on such a paper that the holder is entitled to sell or to discount it. (*Birdeback v. Wilkins*, 10 Harris, 26; *Ames v. Drew*, 11 Foster, 475; *Symonds v. Atkinson*, 37 L. and Eq., 585; 25 L. and Eq., 318.) Nor can the holder write an assignment or guarantee not authorized by the endorser. (4 Duer, 45; 25 L. and Eq., 19; 6 Harris, 434.) This doctrine has been applied to determine conflicting claims to public securities which were not negotiable on their face, though the subject of frequent transfers.

The suit of *Toukin v. Fuller* (3 Doug., 300) was for four victualling bills drawn by commissioners of the victualling office on their treasurer, in favor of their creditor. These were sent to an agent with a power of attorney, "to receive money and give receipts and discharges," and who pledged them for an advance of money. Lord Mansfield said the only question is, who has the right of property in this bill? It must be the plaintiff's, unless he has done something to entitle another. It is deposited with the defendant by one who had it under a limited power of attorney. If the plaintiff had ever consented to the disposal of the bill, he would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretence.

*Glynn v. Baker* (13 East., 509) was a suit for bonds of the East India Company, payable to their treasurer, and sold with his endorsement. Le Blanc, Justice, said:

"Here are persons intrusted with the securities of A and B, who part with the securities of A, and, when called on for them, give the securities of B. That difficulty can only be



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*Combs v. Hodge et al.*

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met by assimilating such securities to cash, which, whether it has an ear-mark set upon it or not, if passed by the person intrusted with it to a *bona fide* holder for valuable consideration, without notice, cannot be recovered by the rightful owner; but how does the similitude hold?"

And Lord Ellenborough said, "any individual might as well make his bond negotiable."

The case of *Dunn v. Commercial Bank of Buffalo* (11 Barb., 580) originated in the refusal of that bank to allow a transfer of stock on the books of the bank, which was transferable by the holder of the certificate or his representative.

The plaintiff had the certificate and a blank assignment, and a blank power of attorney, and claimed to make the transfer. The court denied that certificates of stock in reference to negotiability are placed on the same ground as bills of exchange, and declare that it is incumbent on a party claiming under such a transfer to prove the contract or consideration. In *Menard v. Shaw*, comptroller, (5 Texas R., 334,) the Supreme Court of that State decide that the agency of the payee named in certificates like the present is indispensable to a legal transfer on the books of the State, and that a forced sale was therefore inoperative. The decision of *Baldwin v. Ely* (9 How., 273) does not sanction the claim of the defendants.

The certificates which were the subject of controversy were issued, under an act of Congress, to a person or his assigns.

The ordinary form of assignment was a blank endorsement, and this had been recognised as sufficient at the Treasury of the United States, and in the ordinary traffic in the community.

The defendant proved that he had paid value for them. In the cases cited from Douglas and East, the judges stated that the existence of similar facts might give another aspect to the claims of the defendants in these cases. In the case before us, the certificates were transferable, in terms only, in a single mode.

There was no evidence that a transfer in any other form than that prescribed had ever been recognised.

We have considered this cause upon the assumption that the defendant was a holder for value.

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*United States v. Nye.*

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There is no statement in the answer of the consideration paid to Love for these certificates, nor of the time, place, and circumstances, of the contract between him and the defendant's testator. It appears that the plaintiff did not direct their sale or transfer, and that they were not disposed of on his account; and if there had been a power of attorney containing an authority to sell, the circumstances would have imposed upon the defendant the necessity of showing there was no collusion with Love. Upon the case as presented the court is constrained to reverse the decree of the Circuit Court, dismissing the plaintiff's bill. But the case is presented in an unsatisfactory manner.

The transaction between Love and the decedent (Hodge) has not been exhibited to the court, although parties fully cognizant of it are before the court.

We have concluded to remand the cause to the Circuit Court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised.

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THE UNITED STATES, APPELLANTS, *v.* MICHAEL O. NYE.

Where there was a petition for land in California, addressed to Micheltorena, the Governor, which was referred by him to his Secretary, Jimeno, and by him to Sutter, and there is no evidence that these papers, with Sutter's certificate, were ever returned to the Governor, or sanctioned by the authorities of the State subsequently, the evidence is not sufficient to support the claim, although sanctioned by what is called Sutter's general title.

Sutter's general title was this :

In December, 1844, Micheltorena issued a general grant to all persons who had made applications upon which a favorable report had been made by Sutter, and directed Sutter to give them a copy of this order, to serve instead of a formal title.

But this power thus conferred upon Sutter was abrogated by the abdication of the Governor, and, in this case, the power was not executed for more than a year after such abdication. The claim is therefore invalid.

THIS was an appeal from the District Court of the United States for the northern district of California.

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*United States v. Nye.*

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The facts of the case and grounds of the claim are stated in the opinion of the court.

It was argued by *Mr. Hull* and *Mr. Black* (Attorney General) for the United States, and *Mr. Benham* for the appellee, upon which side there was also a brief by *Mr. Felch*, and one by *Mr. Hawes*.

For the United States, it was contended that, under the laws of 1824 and 1828, the Governor had not the power to issue such a grant, and that, when it was issued, Micheltorena was not *de facto* Governor.

For the claimant, it was contended that the Governor had this power; that he was not restricted by the executive regulation of 1828; that the grant took effect *in presenti*; that it was not necessary for the grantee to be named; that the party who was to take could be proved by extrinsic evidence; that in this case the grantee was easily made out; that the record shows Nye to be one of the persons; that it was not necessary for the grant to be delivered to Nye, but that a delivery to Sutter was sufficient; that, under the Spanish law, copies were public writings; and that all the claimants under this general title were a meritorious class.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee claimed, before the board of commissioners for the settlement of land claims in California, four leagues of land called "Wylly," situate on the Sacramento river and the Arroyo de los Venados. His evidence consists of a petition addressed to Micheltorena, Mexican Governor of the Department of Californias, in December, 1848, at Monterey, representing that he was a native of the United States; that he had resided in Mexico two years; that he had some horses and cattle, and desired to possess a suitable place for them. The Governor referred this petition to the Secretary, Jimeno, to obtain the proper information on the subject. The Secretary referred the petition to Senor Sutter, commissioner (*encargado*) of the fron-

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*United States v. Nye.*

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tier of the Sacramento. Sutter certifies, on this reference, that the land is now unoccupied. His certificate is dated 29th January, 1844. There is no evidence to show that these papers were returned to Micheltorena, or that he ever saw the certificate. They are produced by the claimant.

The remainder of his evidence consists of what is termed, in the opinion of the board, "Sutter's general title," which bears date the 22d December, 1844, and is as follows:

"Manuel Micheltorena, Brigadier General of the Mexican Army, Adjutant General of the *Plana Mayor*, Governor, Commandant General, and Inspector of the Department of the Californias.

"The Supreme Departmental Government being unable, in consequence of its incessant occupations, to draw up, one by one, the respective title papers (*títulos*) for those citizens who have solicited lands, with *informe* in their favor of Mr. Augustus Sutter, captain and judge charged with the jurisdiction of New Helvetia and Sacramento:

"In the name of the Mexican nation, I do by these letters confer upon them and their families the property of the lands designated in their respective applications (*instancias*) and maps, (*diseños*), upon all and each one who have solicited (the same) and obtained the favorable *informe* of the aforesaid Mr. Sutter, up to the day of this date—so that nobody shall have power to question their right of property, a copy hereof, which Mr. Sutter shall hereafter give them, serving them for a formal title, with which they will present themselves to this Government, in order to extend the same title in due form and on stamped paper.

"And that it may remain firm and stable in all time, I give this document, which shall be recognised and respected by all the authorities, civil and military, of the Mexican nation, in this and the other Departments, authenticated with the military and governmental seals in Monterey, this twenty-second day of December, one thousand eight hundred and forty-four

"MICHELTORENA."

"I certify this is a copy.

"*New Helvetia, June 8th, 1846.*

"J. A. SUTTER."

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*United States v. Nye.*

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The circumstances under which this order was executed appear from a deposition of Sutter to be found in the record. He says: "That this document was delivered to him at his request. That the Governor was blockaded at Monterey, and would not deliver titles to the American and other immigrants who were desirous of obtaining lands, and he (Sutter) advised him to give them titles at once; and that the Governor had not time to do it in any other way. He never knew that the Governor was blockaded until the courier came with the paper above referred to." He further testifies that the mode he had adopted in giving titles to individual settlers was, to deliver certified copies of this decree of Micheltorena to those who had rendered meritorious services to the country, and who applied to him. That Governor Micheltorena, at his request, made a speech to the soldiers, and promised lands to all those whom he (Sutter) should recommend as worthy to receive them. The general title was issued before the men marched from New Helvetia. He testifies that the lands were never measured, and there was no formal delivery of possession. There were no surveyors or means of measurement. We have examined with particularity the Mexican laws of colonization in the case of the *United States v. John A. Sutter*, at this term, and it is not necessary to do so in this case. It is evident that this "general title" had no reference to those laws, as none of their requirements were considered when it was made. It is questionable whether the previous application of the claimant was before the Governor, or under the control of his subordinates, at its date. The general title was sent to Sutter, to enable him to raise a military force to assist the Governor, who was confined to his capital by the forces of the insurgent chiefs, who had determined to expel him from the country. His ability to comply with the expectations it encouraged depended upon the success of his efforts to maintain his authority in the Department, and to secure the sanction of the Supreme Government to the extraordinary measures he had adopted for that purpose. The decree has no signification except as an appeal to Sutter, and the persons under his influence, to come to his relief, and as a promise to them that he

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*United States v. Bassett.*

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would make a liberal distribution of land among them, in case they should faithfully and successfully assist him in his extremity. But the issue of the war was fatal to Micheltorena, who was compelled to leave the country; and Sutter, his lieutenant and partisan, was made prisoner, and was required to abandon his chief, and to promise fidelity to his enemies. Whatever power was conferred upon Sutter was abrogated then, if not before. The execution of the power conferred, if any, in favor of this claimant, did not take place for more than a year after the abdication of Micheltorena.

The opinion of the court is, that the claim of the appellee is invalid, and the decree of the District Court is reversed, and the cause remanded, with directions to that court to dismiss the petition.

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**THE UNITED STATES, APPELLANTS, v. NATHANIEL BASSETT.**

Where there was a petition for land in California to Micheltorena, in July, 1844, but no final action was taken upon it except under Sutter's general title, (see preceding case of *United States v. Nye*,) the claim is not considered to be sufficiently established.

This was an appeal from the District Court of the United States for the northern district of California.

The facts are stated in the opinion of the court.

It was argued by *Mr. Hull* and *Mr. Black* (Attorney General) for the United States, and by *Mr. Blair* and *Mr. Vobey E. Howard* for the appellee.

The case, like the preceding one of *Nye*, depended upon the validity of Sutter's general title, and the same points are applicable to both.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee submitted to the board of commissioners appointed under the act of Congress of the 3d of March, 1851, (9

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*United States v. Bassett.*

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Stat. at L., 682, ch. 41,) to settle private land claims in California, a claim for four square leagues of land in the valley of the Sacramento river, called "Las Colussas," as the assignee of John Danbenbiss. His evidence consists of a petition of Danbenbiss to Micheltorena, Governor of California, dated in July, 1844, in which he describes himself as a native of Germany, but naturalized in Mexico, where he had resided two years, and that he desired a grant of this land to devote himself to agriculture. The Secretary, Jimeno, reported that the consideration of many petitions of the same nature had been postponed until after the Governor had visited the country of the Sacramento and San Joaquin; and as he had no general map of the country to guide them in making grants, he suggested that this petition should be laid over with the others. The Governor thereupon made an order that the petitioner might take possession, and deferred further action until he should visit the country; and returned the papers to the petitioner.

During the fall of 1844, a formidable insurrection against Micheltorena was maintained by some of the leading men in California, and in the month of December of that year he was beleaguered at Monterey. One of the principal grounds of complaint against him was an imputed disposition to strengthen the settlement of Sutter on the Sacramento by improvident grants to foreign emigrants.

While the Governor was blockaded at Monterey, a courier was sent to Sutter, conveying the document known as Sutter's "general title," which is set out in the opinion of the court in the case of the *United States v. Michael C. Nye*, and by which Sutter was enabled to collect a body of "foreign volunteers," who went to the aid of the Governor. Danbenbiss was one of those who accompanied Sutter.

The forces of the rival chiefs met at Coahuanga the latter part of February, 1845, and, after a bloodless battle, Micheltorena consented to abdicate his office in a short time, and to leave the country. In June, 1846, Sutter gave to the petitioner (Danbenbiss) a certified copy of the "general grant," which was produced to the board of commissioners as the complement to the other evidence of title in favor of Danbenbiss.

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*White Water Valley Canal Company v. Vallette et al.*

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None of these documents are to be found in the public archives. No trace of the evidence on which these titles depend is exhibited in any of the records of that State. The consideration on which they were made have no reference to the colonization laws of Mexico. The promises of Micheltorena to Sutter, and through Sutter to the foreign volunteers, did not confer a title to any part of the public domain, nor perfect any incipient pretension into a vested interest. The parties looked to the contingency of a suppression of the revolt and the maintenance of the power of the Governor for the fulfilment of these promises. In this they were disappointed. The paper remained in the possession of Sutter for nearly fifteen months after the defeat and abdication of Micheltorena, before he gave a copy to Danbenbiss.

For these reasons, and others contained in the opinion of the court in the case of the *United States v. Nye*, it is the judgment of the court that the claim presented by the appellee is invalid. The decree of the District Court of the United States for the northern district of California is reversed, and the cause remanded to that court, with directions to that court to dismiss the petition.

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**THE WHITE WATER VALLEY CANAL COMPANY, APPELLANTS, v.  
HENRY VALLETTE AND OTHERS.**

Bonds issued by a canal company, pledging the real and personal property of the company for the payment of the debt and interest, and containing other corresponding stipulations, will be treated by a court of equity as a mortgage, and enforced according to the intention of the contracting parties.

Bonds issued in payment for the completion of the canal were not usurious by the laws of Indiana, although they purport to be for a loan, and although the sum for which they were issued was largely greater than the estimated cost of the work.

The power to issue these bonds is derived from the charter of the company. Moreover, the contract was sanctioned by a special law of the State. And if the contract had been originally illegal, this law of the State would have prevented either party from setting up the illegality as a defence.

The decree of the Circuit Court, appointing a receiver, &c., is therefore affirmed.

THIS case originated in the Circuit Court of the United States for the district of Indiana.



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*White Water Valley Canal Company v. Vallette et al.*

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It was a bill filed on the equity side of the court, by Vallette, a citizen of Ohio, against the White Water Valley Canal Company, a corporation created by a law of the State of Indiana. The whole suit was conducted according to the rules of a court of chancery. After the decree, the company prayed an appeal in open court, filed a bill of exceptions, which was allowed and signed by the district judge, and upon this a writ of error was sued out.

The nature of the contract and form of the bonds are set forth in the opinion of the court.

The heading of the bonds was as follows, viz :

UNITED STATES OF AMERICA, }  
*State of Indiana.*

\$1,000.

No. 18.

*The White Water Valley Canal Company.*

Canal Loan. Seven per cent. bond under the act of the General Assembly of the State of Indiana, entitled "An act to incorporate the White Water Valley Canal Company," January 20, 1842.

Know all men by these presents, that there is due from "the White Water Valley Canal Company" to Henry Vallette, or bearer, the sum of, &c., &c.

The case was argued by *Mr. McLean* and *Mr. Stanbery* for the appellants, and *Mr. Swayne* and *Mr. Ewing* for the appellees. Upon this side there was also a brief filed by *Mr. Fox*.

The counsel for the appellant contended:

1. That there was no power to issue bonds which should claim priority, by way of mortgage, over all other creditors. They admitted the right of these bondholders to come in amongst the other creditors, but denied their claim to exclusiveness.

2. That the bargain was too hard, because the bonds were issued for twice the amount which had been expended in finishing the canal.

Upon the first point, they referred to the difference between

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*White Water Valley Canal Company v. Vallette et al.*

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the original and amended bill filed by Vallette; the original having placed the transaction upon the footing of a loan under the 18th section of the charter, whilst the amended bill placed it upon the footing of a contract made for finishing the work. The power to mortgage was denied, because it included a power to sell, and in this case the company was a mere trustee created by the State to finish a work in which the State had already invested a million of dollars. The State reserved the right to redeem the canal upon certain conditions, which right was incompatible with a power in the company to mortgage and sell, and thus forever alienate the whole work. When sold, how could an individual purchaser carry it on? Could he exercise the power of eminent domain, of crossing public highways, and of making penal statutes necessary to continue the operation of the canal? Other parts of the charter were inconsistent with the alleged power of the company to sell out, or do anything which might lead to selling out, the whole concern. The grant of power in the 18th section carries with it an inference that the same power is not granted in any other section of the charter. The law of 1845, legalizing the bonds, was only intended to sanction the payment of seven per cent. interest, which is proved by that part of the preamble which says, "whereas doubts are entertained as to the legality of the issue of such bonds *under the present interest laws* of the State."

The contract was a very onerous one. In it there is nothing said about giving this debt a priority over all other debts; but Vallette appeared to look for his profit in the fact of receiving bonds for double the amount which it would cost to finish the canal. The company had already paid upwards of \$75,000 upon account of these bonds, whereas the money expended by Vallette was only \$56,000. At the most, there was only an agreement to give him a mortgage, which, not being executed, ought not to exclude other creditors whose claims are perfectly fair and *bona fide*. When the company made this bargain, it was in great straits for money, and Vallette took an unconscientious advantage of a necessitous debtor.

Authorities were adduced to sustain the following propositions, viz:

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*White Water Valley Canal Company v. Vallette et al.*

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1. Corporations are strictly limited to the exercise of those powers which are expressly granted to them, or are necessarily incident either to the purposes of their existence, or to the proper enjoyment of their express powers.

2. An express grant of a specific power, in one section of a charter, is a prohibition against the exercise of the same power by implication from the provisions of another section.

3. The express grant of a specific power is *restrictive* in its operation, and not only must the occasion for its exercise arise, but the method and manner of its execution must be strictly adhered to, according to the terms of the grant, or its exercise is a nullity.

4th. A corporation may deny the validity of any contract which it may have entered into without authority for so doing under its charter. (4 Peters, 164; 2 Cranch, 127; 9 Howard, 172; 13 Peters, 518; 7 Ohio, part 1, 232; 8 Ohio, 252, 286, et seq.; 15 Johnson, 358; 2 Cowen, 678; 5 Connecticut, 560; 7 Wendell, 31; 8 Gill and Johnson, 248; 5 Barbour, 618.)

The points made by *Mr. Ewing* and *Mr. Swayne* were the following:

We will not discuss the question whether this is or is not a loan of money. It is a matter of no importance. Parties and counsel may give it what name they please.

I. Whatever be its name, the transaction is one which does not bring the case within the usury laws.

It is a contract to construct the canal at specified prices, and receive therefor payment in bonds of the company.

The work at the contract prices amounted to \$112,000. It was paid for in the bonds of the company, according to the contract.

Much better terms could have been got, if the company had had cash to pay. But, in the exchange of work for bonds, it was the best that could be done.

There was no money passed between the parties in the transaction. Vallette did the work under a contract, and took a lien on the work to secure the payment of his bonds.

It is in equity just what the contract of a builder would be,

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*White Water Valley Canal Company v. Vallette et al.*

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who should contract for a lien on the rents of the house which he should build, until paid.

And it would not interfere at all with the builder's equity, if he demanded a higher price, payable in bonds at a distant day, than if he were to be paid in cash; and especially if the payment for his work depended on the productiveness of the property covered by equitable mortgage, subject to loss by flood and fire. If we did but know how much it would have cost him to insure the claim, we might determine whether the contract was reasonable.

Until this matter is settled, as the agreement was made between parties entirely competent to contract, we must presume it to be so.

II. It is no matter whether this be a loan or not.

1. The corporation had a right by its general powers, independently of the 18th section, to make this contract, and to pledge the tolls, &c., of the canal for the payment.

It creates a lien that equity will enforce.

2. The contract comes within the reason and spirit of the 18th section. If the company is thereby authorized to pledge the tolls, &c., of the canal for the repayment of money borrowed to construct, it is also authorized to make the pledge for construction directly.

They may pledge for the loan, because it constructs the canal. It is a workman's lien. But instead of pledging to the contractor, the pledge is to the lender, whose money pays him. If the contractor furnish the money to pay himself, may they not pledge to him? To deny it would be a mere verbal criticism—a sticking in the bark.

III. But the act of January 4th, 1845, removes all possible difficulty, if there were any, after the contract was made and executed by Vallette; it sanctions the contract, and makes valid all bonds which shall be issued in pursuance of it.

If the company had not the power already to issue these bonds, their issue after the act is an acceptance of it.

Other points are made by the answers, but they are wholly unsustained by the testimony, and are not referred to in the brief for the appellant. We understand they will not be relied

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*White Water Valley Canal Company v. Vallette et al.*

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upon in the argument at the bar. We deem it unnecessary, therefore, to advert to them.

In addition to the authorities cited in the brief of our colleague, Mr. Fox, we shall refer to the following:

1. *James v. C. and H. R. R. Co.*, (6 Amer. Law Register, 718.) Where a charter directs the mode of exercising given powers, that part of the statute is *directory*, and a departure from the mode prescribed does not in any wise invalidate the acts of the corporation. See also the authorities cited upon this point in the opinion of the court.

2. *Thompson v. N. Y. and H. R. R. Co.*, (8 Sandford Ch. Rep., 626.) "A corporation authorized by law to build a bridge at a given point may buy one already built at the same point, if suitable for their purpose." Syllabus.

3. *Palmer v. Lawrence*, (3 Sandf. Law Rep., 162.) "A party will not be permitted to rescind a contract, the fruits of which he retains, and can never be compelled to restore." Syllabus.

4. *Steam Nav. Co. v. Weed*, (17 Barbour, 378.) "Where it is a simple question of *capacity to contract*, arising either on a question of regularity of organization or of *powers conferred by the charter*, a party who has had the benefit of the contract, in an action founded upon it, is not allowed to question its validity." Syllabus. See also Sedgwick on Construction, p. 90.

5. This doctrine applies alike, whether the corporation or the individual contracted with be the party sought to be charged. (*Moss v. Rossie Lead M. Co.*, 5 Hill, 137; *Steam N. Co. v. Weed*, 17 Barb., 378.)

The case last cited will be found to contain a very full collection and able analysis of all the leading authorities upon this subject.

Mr. Justice CAMPBELL delivered the opinion of the court.

This controversy originated in a contract between the appellants and the appellee, (Vallette,) in which the latter agreed to complete that portion of the canal through the valley of White Water river that lies between the cities of Laurel and Cambridge, in Indiana.

In the year 1836, the State of Indiana projected the improve-

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*White Water Valley Canal Company v. Vallette et al.*

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ment of which this is a part, and prosecuted the work until 1842, at an expenditure of more than one million of dollars. In that year the appellants were incorporated, and the State surrendered the unfinished work to them, investing them with powers to continue it till its completion. In 1844 this corporation became embarrassed in their affairs, and were unable to negotiate loans upon the pledge of their property. Their resources were inadequate to the demands of their enterprise, and there was fear that it would be abandoned, or at least inconveniently postponed. In July, 1844, the president of the company applied to the appellee (Vallette) for assistance, and the result of their negotiation was, that the latter submitted a proposal to the company to supply materials and to complete at his expense the canal, according to the plan of the chief engineer, by the 1st of September, 1845, for one hundred and twenty-five bonds of the company, of \$1,000 each, upon ten years' time, drawing interest at seven per cent. per annum, payable semi-annually, he (Vallette) to pay in the paper of the company \$500 as a bonus.

This proposal was accepted, and a detailed contract was drawn out and executed, embracing some modifications not material to this dispute. The appellee agreed to construct in a substantial and workmanlike manner the sections of the canal, under the directions of the chief engineer, and according to particular specifications. The engineer was to decide whether the work had been performed agreeably to contract and the instructions of the engineer; and payment was to be made upon his certificate of the work done at the end of every sixty days. The contract was punctually performed by the appellee to the satisfaction of the company, and upon a final settlement one hundred and sixteen bonds of \$1,000 each were issued to him, one hundred and twelve bearing date the 1st of February, 1845, with interest at the rate of seven per cent. per annum, payable semi-annually at New York, the principal to be paid at ten years from date. These bonds contain recitals and stipulations as follows: That the principal sum is the first and only loan created by the company under their charter for the completion of the canal; that the faith of the company and

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*White Water Valley Canal Company v. Vallette et al.*

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their effects, real and personal, are pledged for the payment of the debt and interest; that these bonds shall have a preference over all debts to be thereafter contracted; that in default of the payment of interest, the holder of the bonds might enter into possession of the tolls, water rents, and other incomes of the company; and might apply to any court of the State (Federal or State) for the appointment of a receiver, and that the company would not appeal to any other court; that they would pay ten per cent. as liquidated damages on the amount of the interest thus collected. The interest on these bonds was paid until August, 1854, since when the corporation has been in default.

The appellees hold the one hundred and twelve bonds above described, and have filed this bill to enforce the covenants they contain by the appointment of a receiver. They allege that the company is insolvent; that its stock has no value, and that the canal is exposed to dilapidation and ruin, and they have no ability to remedy such disasters.

The defendants resist the demand of the appellees. They aver that the president of the company applied to Vallette for a loan of money; that Vallette was willing to advance the sum required, if he could make a profit of one hundred per cent., and the president and directors were ready to concede this profit. That the contract was made between them as a device and contrivance to evade the laws of Indiana upon the subject of interest and usury, and that the contract between the parties in its essence and spirit was a loan of money at that exorbitant and usurious rate of interest. That the work was done by the company through the superintendence of their engineer, and that Vallette paid out the money to contractors merely to secure its appropriation to the improvement of the canal to strengthen his security. That the amount expended was but \$56,000, and the estimates of the engineer prior to the making of the contract did not exceed \$65,000; and that the contract was arranged so that the profit of one hundred per cent. might be realized.

They complain that the exactions of the appellee were exorbitant and oppressive. That the canal has been exposed to

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*White Water Valley Canal Company v. Vallette et al.*

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disasters from heavy floods, and a debt has been created for reparations and improvements that is superior in dignity and merit to that of the appellee, and that he had waived his preference to induce them to make the advance.

In the absence of objections to the validity of these bonds, there can be no question concerning their legal operation and effect, or of the jurisdiction of a court of equity to enforce them. That court treats an agreement for a mortgage or pledge of bonds, or other property, as binding, and will give it effect according to the intention of the contracting parties. (*Duncan v. The Company of Proprietors of the Manchester Water Works*, 8 Pri., 697; *Fector v. Philpott*, 12 Pri., 197; *Seymour v. Candaugua and N. F. R. R. Co.*, 25 Barb., 284.)

In *Fripp v. Chard Railway Company*, (21 Law and Eq., 58,) the Vice Chancellor decided that the court of chancery might appoint a receiver of the property of a corporation created by act of Parliament in favor of a mortgagee, although by the act a committee was constituted to whom all the powers of management were referred. And at the present term of this court a receiver for the tolls of a bridge erected by a corporation in Indiana was allowed by this court in favor of a judgment creditor, whose legal remedy had been exhausted. (*Covington Drawbridge Company v. Shepherd*, 21 How.)

The question then arises, whether the contract between these parties, as disclosed by the pleadings and proofs, is valid. It is essential to the nature of usury in Indiana, that a certain gain exceeding the legal rate of interest should accrue to the lender as a consideration for the loan. Where there is no loan there can be no usury. (*State Bank v. Coquillard*, 6 Ind., 232.)

And where there is a loan, although the profit derived to the lender exceeds the legal rate, yet if that profit is contingent or uncertain, the contract, if *bona fide* and without any design to evade the statute, is not usurious. (*Cross v. Hepner*, 7 Ind., 357.)

The testimony does not support the averment of the answer, that this contract involved a device or contrivance to elude the prohibition of the statute. The president of the corporation (Mr. Helm) testifies: "I know nothing of any such device or



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*White Water Valley Canal Company v. Vallette et al.*

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arrangement; I thought it was all right; and there was none, so far as I know or believe, to evade the usury laws of Indiana; nor was there any device or arrangement to cover up a loan of money from Vallette to said company, as I know of no such loan." The testimony of the solicitor of the corporation, (Mr. Parker,) who superintended all the negotiations, and drew the papers, is equally explicit. He says: "I am satisfied there was no device or management had or intended between said Vallette and the canal company, in the matter of this contract or otherwise, whatever, in this connection, to avoid any usury laws of the State of Indiana, or any other State. I never thought of such a thing myself, and never had an intimation of it from any other source; and had there been anything of the kind, I would certainly have known it, as I have said the whole matter in every shape it assumed was presented to me for my consideration. Vallette had all the risk of his contract on his own hands, until completed and taken off his hands by the company. And I have a strong impression in my own mind, that in one if not more instances he suffered by that risk in consequence of damage done his work, while in progress, by high waters." In the absence of simulation in the contract, the reason assigned in the last sentences quoted from the testimony of this witness is conclusive on the question of the usury. These witnesses are sustained by their fellow-members of the board. The recital in the bonds, that this was a loan, is explained by the fact that the form of the bonds was settled after the work was finished, and with reference to their negotiability in New York, and the contract was regarded with favor by the corporation, and the payment of interest was made without exception for several years. It is admitted that the contract provided prices for the work done far exceeding the cash estimates of the engineer. This, the witnesses say, was the natural consequence of the embarrassment of the company and their want of credit. But they prove that the proposal of Vallette was understood and considerably examined; that it was adopted by the board, with only one dissentient vote; that its conditions were performed in good faith by the appellee, and that the final settlement between the contracting parties was

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*White Water Valley Canal Company v. Vaillette et al.*

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amicable. There was on the part of the appellee no fraud or circumvention.

These facts oppose an insuperable bar to any relief from the contract on the ground of lesion or oppression. (*Harrison v. Guest*, 85 Law and Eq., 487.)

The remaining question for consideration is, whether it was competent for this corporation to execute such securities as these bonds in fulfilment of their covenants in a construction contract, fairly made and executed by the other party. The first section of the act of incorporation endows the corporate body with faculties for suits, contracts, and all other things legitimate for such company to do; and "all the powers and privileges in any wise necessary and expedient to carry into effect the proper business" of the association. The seventeenth section establishes the president and directors as the governing body, and that "their regular and efficient doings not inconsistent with this charter" "shall in all cases be deemed the doings of the company, and forever held valid as such."

The 18th section invests them with "full power to negotiate any loans that may be deemed expedient for carrying out all the objects contemplated by this act; and for the payment of such loans, agreeably to the terms agreed upon, said company shall bind themselves by their bonds, which bonds," &c., &c., "shall be a valid lien upon all the stock and effects of said company in the order of their issue, and all the effects of the company, both real and personal, shall be deemed and taken as a pledge for the punctual payment of the interest on said bonds, and the ultimate redemption of the principal, agreeably to contract.

It is well settled that a corporation, without special authority, may dispose of land, goods, and chattels, or of any interest in the same, as it deems expedient, and in the course of their legitimate business may make a bond, mortgage, note, or draft; and also may make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law. (*Partridge v. Badger*, 25 Barb., 146; *Barry v. Merchants' Ex. Co.*, 1 Sand. Ch. R., 280; *Burr v. Phoenix Glass Co.*, 14 Barb., 358; *Dater v. Bank of the U. S.*, 5 W. and

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*White Water Valley Canal Company v. Vallette et al.*

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S., 223; *Frazier v. Wilcox*, 4 Rob., 517; *U. S. Bank v. Huth*, 4 B. M., 423; *The State v. Bank of Md.*, 6 G. and J., 823; *Pierce v. Emery*, 32 N. H., 486.)

But, in addition to the general powers of the corporation, in this instance there is "*full power*" (specially conferred) to negotiate any loan or loans that the company might deem expedient for carrying out any or all of the objects of the act. We should find great difficulty in deciding that the corporation was restrained by the laws concerning interest and usury, in view of the comprehensive language of the 18th section of the act. Those laws rest upon considerations of policy applicable, for the most part, to individuals engaged in their ordinary business; and the Legislature might well conclude that a numerous body, engaged in a public enterprise, under the direction of an intelligent board, might be trusted with a plenary control of their property or credit, to accomplish the aim of the association.

If the rights of the appellees depended upon the act of incorporation alone, it would be difficult to resist them. But, in January, 1845, the Legislature of Indiana passed an act, that recites the corporation had entered into a contract with Vallette to complete the canal, and was to be paid in their bonds, drawing the legal interest in New York, and doubts were entertained as to the legality of the issue of these bonds; and thereupon it was enacted, that all the bonds which might be issued in accordance with the contract existing between the company and Vallette were *legalized*. A large portion of the work specified in the contract was performed after this enactment, and the settlement under which these bonds were issued took place subsequently. This act implies that there was no illegality in the fact that bonds were employed as a medium of payment for supplies of materials for, or work and labor done upon, the canal.

The objection that a contract is illegal, and that no judgment can therefore be rendered upon it, is not allowed from any consideration of favor to those who allege it. The courts, from public considerations, refuse their aid to enforce obligations which contravene the laws or policy of the State. When the

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*Easton v. Salisbury.*

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Legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist on this objection. (*Andrews v. Russell*, 7 Black., 475; 8 Ind., 27.)

Upon a review of the whole case, it is the opinion of the court that the contract between these parties was made without fraud or surprise; that there is no illegality in the cause, or consideration; that the priority of payment has not been released or defeated; and that the relief sought is within the competency of a court of equity to allow.

Decree affirmed.

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**ALTON R. EASTON, PLAINTIFF IN ERROR, v. THOMAS L. SALISBURY.**

Between May, 1829, and July, 1832, there was an interval in the acts of Congress reserving lands from sale which were claimed under Spanish concessions in Louisiana; and during this interval, an entry or patent for any of these lands would have been valid.

But a patent issued in 1827, whilst the reservation was in force, was void, and the patent did not become operative *proprio vigore* during the interval between 1829 and 1832.

The confirmation of the concession in 1836, therefore, gave a good title to the claimant under the concession.

Moreover, the New Madrid warrant, not being located within one year from the 26th of April, 1822, was void.

THIS case was brought up from the Supreme Court of Missouri by a writ of error issued under the 25th section of the judiciary act.

It was a petition in the nature of an ejectment brought by Easton against Salisbury in the St. Louis Court of Common Pleas, to recover the lots described in the opinion of the court. The Court of Common Pleas gave judgment for the defendant, and this judgment was affirmed by the Supreme Court.

The plaintiff claimed under a New Madrid patent issued in 1827, and the defendant under a Spanish concession which was confirmed in 1836. The Supreme Court of Missouri

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*Easton v. Salisbury.*

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were of opinion that the New Madrid patent was absolutely void when issued, and that it did not become operative in the interval between May, 1829, and July, 1832.

The case was argued in this court by *Mr. Gibson* and *Mr. Gamble* for the plaintiff in error, and by *Mr. Ewing* for the defendant.

The counsel for the plaintiff in error contended that the question involved in this case was not ruled or raised in *Mills v. Stoddard*, or *Stoddard v. Chambers*, and that *Easton* had a right to perfect his title in the interval between 1829 and 1832.

The two points were thus stated :

I. The title under which the plaintiff claims was good against the United States. (*Les Bois v. Brammell*, 4 How., 449; *Stoddard v. Chambers*, 2 How., 284; *Mills v. Stoddard*, 8 How., 364; *Menard's Heirs v. Massy*, 8 How., 310; *Delauriere v. Emerson*, 15 How., 525; *Hoofnagle v. Anderson*, 7 Wheaton.)

The survey made by the surveyor general, its return by him to the recorder of land titles, the issuing of a patent certificate by that officer, and of a patent by the President of the United States, were all acts done by the proper officers of the United States; and the question is now for the first time raised in this court, as to the effect of these acts as *against the United States*.

This question was not only not decided in *Mills v. Stoddard*, or *Stoddard v. Chambers*, but the point was not involved in those cases, nor raised by the counsel. On the contrary, in *Chambers v. Stoddard*, (2 How., 295,) the plaintiff's counsel, Messrs. Lawlers and Ewing, say: "If the question were now between the United States and locator, there might, perhaps, be some grounds for a liberal construction. It might be contended, that the surveyor general, who filed the location and surveyed it, being an officer and agent of the United States, his act as against his principal ought, if possible, to be binding."

And the inquiry in that case was, as stated by this court, "whether the defendant (*Chambers*) had any title, *as against the plaintiffs*."

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*Easton v. Salisbury.*

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II. The land was subject to be disposed of by the Government during the existence of the bar, from 1829 to 1832, to any person, or in any manner, and was then open to entry or location.

And the plaintiff had the right, during this time, to perfect his title. But had the plaintiff applied for a patent during the bar, (and this court say a patent issued then would have incontestably passed the title,) he would have been properly answered by the officers of the Government, that two patents could never issue by the Government for the same land under the same title, and to the same person; and that, as his patent passed any title the Government might have, a second patent could add no strength to his claim.

Suppose the plaintiff, relying on his patent, had purchased Bell's claim in 1827, and, having then both titles, had failed or neglected to have it confirmed under the act of 1836; would it not have been a sheer outrage to permit the United States to deprive him of this land, and at the same time to continue to claim the land in New Madrid, in lieu of which this was granted? And yet, such is the legitimate result of the principle which the defendant seeks to establish.

The counsel for the defendant contended that the Supreme Court of Missouri had taken the proper view of the point, that the patent of 1827 was absolutely void; and that, by the act of Congress of April 26, 1822, this warrant was void, being unlocated on the 26th of April, 1823.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Missouri.

The parties agreed as to the facts in this case, in order that the points of law might be ruled by the court.

On the 9th of July, 1811, there were confirmed to James Smith, by the commissioners for the adjustment of titles to land in the Territory of Missouri, lots nine and ten, (9 and 10,) containing two arpens of land, in the village of Little Prairie, in the county of New Madrid, State of Missouri. Afterwards

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*Easton v. Salisbury.*

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these lots, while still owned by said Smith, were materially injured by earthquakes, and proof thereof was made before the recorder of land titles at St. Louis, on the 16th of November, 1815; whereupon, there was issued by said recorder, to said James Smith, a certificate of new location, (commonly called a New Madrid certificate,) numbered 159. On the 22d of October, 1816, said Smith and wife conveyed to Rufus Easton the said two arpens in Little Prairie, and assigned to him the right to locate other lands under said certificate in lieu of the land so injured, and also conveyed to said Easton the land that might be located by means of said certificate. On the 16th of November, 1816, Easton gave notice to the surveyor general of said Territory of Missouri of the location of said certificate on a tract of land about two miles west of the city of St. Louis, and demanded a survey thereof. In March, 1818, a survey was made, by direction of the surveyor general, in pursuance of said selection, and was duly returned and approved by said surveyor general; said survey is numbered 2,491, and the land thereby designated embraces the land in controversy, and is within St. Louis township, in St. Louis county, Missouri. By virtue of the premises, Easton held said land, claiming the same until 1826, when he conveyed the same to William Russell. On the 28th day of May, 1827, the United States issued a patent on said location for said land to James Smith or his legal representatives. On the 19th of January, 1839, William assigned and conveyed all his interest in said land to J. G. Easton, who, on the 18th of March, 1845, conveyed and assigned the same to plaintiff. Defendant is in possession of the land described in the petition, and the same is within the boundaries indicated by said survey and patent.

On the 20th of January, 1800, a concession was made by the Spanish Lieutenant Governor, to one Mordecai Bell, of three hundred and fifty arpens of land, including the premises in controversy. The representatives of Mordecai Bell, on the 29th of June, 1808, presented the claim for said land, together with a descriptive plat of survey thereof, to the board of commissioners for the adjustment of land titles in the Territory of Missouri. The documents showing said claim, and the deriv

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*Easton v. Salisbury.*

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active title from Mordecai Bell, were duly recorded in 1808 by the recorder of land titles for the Territory of Missouri. And on the 4th day of July, 1836, the United States confirmed said claim, according to said plat of survey, to the legal representatives of M. Bell; a survey of said confirmation was made by authority of the United States in —, and is numbered 3,026. Said survey embraces the land in dispute; and all the title of the confirmee, by the act of 1836, is in the defendant. The survey numbered 2,491, and also the patent dated 28th of May, 1827, are in due form of law; but defendant does not admit the authority of the officers of the United States to make the one or issue the other, nor that the same were made or issued under any law. It is admitted that the land in controversy is worth more than two thousand dollars; that if the court should be of opinion that the plaintiff is entitled to recover, it is agreed that the damages shall be fixed at one cent, and the monthly value of the premises at one dollar. Either party is at liberty to turn this case into a bill of exceptions, and thereon prosecute a writ of error, or take an appeal to the Supreme Court of the State of Missouri, or of the United States. It is admitted that survey No. 3,026 was made under the authority of the United States, but the plaintiff may dispute the power of the United States as regards both the confirmation of 1836 and the survey No. 3,026.

It is admitted that the plaintiff had, at the commencement of this suit, all the title that was invested in said James Smith, or his representatives, by the New Madrid location and patent above mentioned.

It will be observed that this controversy arises between a New Madrid title and a Spanish concession. A holder of a New Madrid certificate had a right to locate it on any of the public lands which had been authorized to be sold. This claim came into the hands of Alton R. Easton, the plaintiff in error. It was surveyed in March, 1818, and the 28th of May, 1827, the United States issued a patent to James Smith, or his legal representatives.

From 1808 to the 26th of May, 1829, reservations were made from time to time to satisfy certain claims, but from that time



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*Easton v. Salisbury.*

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they ceased, until renewed by the act of the 9th of July, 1832. During this period, it is understood by the plaintiff in error, the "land in question was subject to be disposed of to any person, or in any manner, and was then open to entry or location. And it is urged that the plaintiff had the right during this time to perfect his title."

The President of the United States has no right to issue patents for land, the sale of which is not authorized by law. In the case of *Stoddard v. Chambers*, (2 How., 318,) it is said, "The location of Chambers was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued." Had the entry been made or the patent issued after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested.

Nothing was done to give Easton's title validity, from the cessation of the reservation, in 1829, until its revival, in 1832. His entry was made in 1818, and on the 28th of May, 1827, his patent was issued. The land located and patented, having been reserved, was not liable to be appropriated by his patent. Whether the withdrawal of the patent might have been procured, or a new one instituted, it is not necessary to inquire. No such attempt was made.

But it seems by the act of the 26th of April, 1822, it was provided that all warrants under the New Madrid act of the 15th of February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point: all New Madrid warrants not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the act of the 4th of July, 1836. Bell made the conveyance to Mackey, not having the legal title; but when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and inured, by way of estoppel, to the grantee, and those who claim by deed under him. (*Stoddard v. Chambers*, 2 How., 317.)

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*McCarty et al. v. Roots et al.*

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There was no period from the entry and patent of the New Madrid claim in which that claim was valid. The location was not only voidable, but it was absolutely void, as it was made on land subject to a prior right. And under the act of 1822, all New Madrid warrants not located within a year from that date, were declared to be void.

Whether we look at the confirmatory act of 1836, which vested the title in the confirmer, or to the New Madrid title asserted against it, it is clear that the New Madrid title is without validity, and that the fee is vested in the grantee of Bell.

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**JULIAN McCARTY AND JOHN WYNN, ADMINISTRATORS OF ENOCH McCARTY, DECEASED, PLAINTIFFS IN ERROR, v. GUERNSEY Y. ROOTS, ERASTUS P. COE, AND JOHN H. AYDELOTTE.**

Where an accommodation bill of exchange was paid by one of the endorsers, and there was no special agreement that they should be bound to pay in equal proportions as co-sureties, the endorser who took it up had a right to assign it as collateral security for a pre-existing debt; and the assignee can maintain a suit against the original payee, who was also an endorser.

The endorser who took up the bill was a trustee; but the plea was defective in not averring that there remained sufficient funds in the trust estate to pay this bill after discharging the trust.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

It was a suit brought by Roots, Coe, & Aydelotte, citizens of Ohio, against Enoch McCarty, a citizen of Indiana.

It was upon a bill of exchange drawn by Tyner & Childers, upon Richard Tyner, of New York, in favor of Enoch McCarty, for \$4,500. Tyner accepted the bill, and McCarty endorsed it to George Holland, who endorsed it to Ezekiel Tyner, who endorsed it to Roots, Coe, & Aydelotte. It was alleged that Holland took it up when past due at the Richmond Bank, and that Holland delivered the bill to the plaintiffs as collateral security for a pre-existing debt of Richard Tyner.

The nature of the pleas is set forth in the opinion of the court, and the following reference to them will be sufficient:

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*McCarty et al. v. Roots et al.*

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Defendant filed eight pleas.

1. The general issue, withdrawn by defendant after the judgment of the court upon the demurrers.

2. Plaintiffs filed replication; issue joined; defendant withdraws plea.

3. Plaintiffs demurred to this plea; joinder in demurrer; demurrer sustained.

4. Plaintiffs filed replication; issue joined; defendant withdraws plea.

5. Plaintiffs demurred to this plea; joinder in demurrer; demurrer sustained.

6. Plaintiffs demurred; joinder in demurrer; demurrer overruled; plaintiffs obtained leave to withdraw their demurrer and reply; replication filed; defendant demurred to it; joinder in demurrer; defendant's demurrer to replication overruled.

7. Plaintiffs demurred; joinder in demurrer; demurrer sustained; defendant obtained leave to withdraw his joinder in demurrer, and to amend plea; amended plea filed; plaintiffs demurred to it; joinder in demurrer; demurrer sustained.

8. Plaintiffs demurred; joinder in demurrer; demurrer sustained.

Upon these rulings of the court, the case was brought up here, and was submitted on printed argument by *Mr. O. H. Smith* for the plaintiffs in error, and argued by *Mr. Gillet* for the defendants.

*Mr. Smith's* points were the following :

1. That as the bill was received by the appellees after it was due, and dishonored, they took it with notice that it was subject to all prior equities between the parties. (Byles on Bills, 129, 130, and numerous authorities, tit. Transfer.)

2. That this case rests upon the same legal defence that could be set up in a suit between the endorsers of the bill as to their equities, if the action had been brought by one of them, after paying the bill, against the defendants. (The same authorities as above.)

3. That co-sureties are liable to contribution as between

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*McCarty et al. v. Roots et al.*

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themselves, after the payment of the bill. (Byles on Bills, 199; *Kemp v. Finder*, 12 M. and W., 421; and authorities cited to fourth position.)

4. That if one co-surety takes up the bill, he cannot maintain an action upon it against a co-surety, but may use it as evidence of the amount paid, in an action of assumpsit for money laid out and expended, in which he may recover in contribution the equitable *pro rata* proportion of the money he has actually paid, from his co-surety. (*Done v. Whalley*, 17 L. J., 225; *Exch. 2 Exch.*, Rep. 198, S. C.; *Gale v. Wash*, 5 T. R., 239; *Rogers v. Stephens*, 2 T. R., 713; *Orr v. Maginnis*, 7 East., 359.)

5. That although the endorsers are *prima facie* liable to each other, in the order in which their names stand upon the bill, yet it lies in averment in the pleadings that they are co-sureties, and parol proof is admissible, as between them, to show the true state of their liability. The same principle applies in suits brought by an endorsee of the bill against a remote endorser, when the bill was taken after it was due and dishonored. (14 Vesey, 170; Byles on Bills, 192, and notes, Ed. 1853; 9 Met., 511; 7 Cush., 404; 4 N. H., 221; 5 Denio, 307; 9 Ala., 949; 28 Maine, 280; 34 ib., 549; 5 How., 278; 21 Pick., 195; 2 Selden, N. Y., 33; 2 Ired., 597; 18 Ohio R., 441.)

6. That if the principal places funds or property in the hands of one co-surety, sufficient to pay the bill in trust for that purpose, and such co-surety takes up the bill from the holder, he cannot sue his co-surety on the bill, nor for contribution, until he has exhausted the assets in his hands of the principal. (8 Pick., 155; 16 Ala., 455; 21 ib., 779; *Adams's Equity*, Ed. 1855.)

7. That time given by the holder to one co-surety for the payment of the bill, to the prejudice of another co-surety, upon a contract binding upon the holder, without the assent of the other co-surety, discharges such other co-surety from liability upon the bill. (9 Conn., 261; 2 Wheaton, 253; 2 Story, 416; 21 Wendell, 108; 2 McLean, 111; 10 N. H., 359; 18 Conn., 361; 3 McLean, 74.) It is admitted that these authorities

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*McCarty et al. v. Roots et al.*

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speak of principal and surety, but we maintain that the principles decided apply to the holder and a co-surety, the case before this court.

8. That after a bill is taken up from the holder by a co-surety, it is no longer available in the hands of such co-surety, or his endorsee, who takes it with notice, after due and dishonored, so as to enable such co-surety taking up the bill, or such endorsee, to maintain an action on the bill against any other co-surety. (7 N. H., 202; 2 Ired., 417; 24 Maine, 336.)

9. That a plea can only be demurred to specially for duplicity, in which case the demurrer must point out the duplicity specially; and if the plaintiff, instead of demurring, replies to the plea, his replication must answer so much of the plea as it assumes to answer; and if it assumes to answer the whole plea, and only answers a part, it is bad on demurrer. (1 Chitty Plead., 228, 229; *ibid*, 668, Ed. 1855; 2 Johns., 433; 20 Pick., 356; 10 East., 79; 1 Saunders, 100, note 1, title Qualities of Replication; 1 Chitty Plead., 643; and authorities, Ed. 1855.)

10. It is no ground of even special demurrer, that a plea contains surplusage; the doctrine of *utile, per in utile non vitiat*, (1 Chitty Plead., 547,) applies.

*Mr. Gillet's* point were the following:

1. The legal liability of the drawer, acceptor, and endorsers, of a bill, is determined by the act of drawing, accepting, endorsing, demand, and notice.

If these things have occurred in the ordinary mode of such matters, the legal liability is fixed, and can only be avoided by showing some fraud or illegality in the creation of the bill, or some positive act of discharge.

2. Contracts in writing, binding between the parties to them, cannot be changed by parol understandings or agreements made at the time of making such contracts. (Thompson v. Ketchum, 8 Johns. R., 192; Robishat v. Folse, 11 Louisiana; Barthet v. Esterbene, 5 La. Annual, 315; Brochemore v. Davenport, 14 Texas R., 602; Bank of the United States v. Dunn, 6 Pet., 56; Brown v. Wiley, 20 How., 442.)

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*McCarty et al. v. Roots et al.*

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3. If the endorsers had an agreement, valid between themselves, as to sharing equally the loss occasioned by their endorsements, such agreement only affected themselves, and did not run with the bills so as to affect their legal liabilities, as to the holders of the bills in question.

If there had been such an agreement as the defendant wishes to have *inferred*, which he does not aver, and it had been binding among themselves, and Holland, or any one of the parties to it, had refused to carry it into effect, the defendant could not take advantage of it in the mode now attempted, but must enforce it by action against the refusing party.

There is no intimation in the plea that Holland agreed to take up the bill, and discharge it, and look either to the trust fund or to the other endorsers for contribution. Nor is it pretended that the plaintiffs knew of such an agreement. If defendant shall pay the whole bill, then he can look to the parties to that agreement to refund their proportions.

But if the agreement assumed to have been made runs with the note, then the defendant would still be responsible for his share as one of the endorsers. In that event, the plaintiffs must recover the one-fourth thereof, upon the defendant's own theory, though it is clearly an incorrect one.

But the defendant has not set out an agreement, either with or without consideration, by which Holland relinquished and changed his rights, as subsequent endorser, to call upon the defendant as a prior endorser for the full amount of his liability.

On the face of the contract, (the bill, non-payment, and notice,) defendant was liable for the whole amount thereof. He can enforce this contract, unless it has been discharged by payment, or by a new valid agreement changing the original liability. To make such an agreement, it must be in writing, and be upon a lawful and sufficient consideration. No such agreement is even hinted at in the pleadings, much less averred, so as to be issuable. It follows, that there was no change of the original contract or liability, and consequently the defendant is liable, and the plaintiffs are entitled to recover.

It is therefore clear that the eighth plea is bad, and the demurrer to it must be sustained.

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*McCarty et al. v. Roots et al.*

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Mr Justice McLEAN delivered the opinion of the court.

This is a writ of error to the District Court of Indiana.

The action was brought on a bill of exchange for \$4,500, dated October 16, 1854, drawn by Tyner & Childers, of Peru, Indiana, on Richard Tyner, of New York, and made payable to the defendant sixty days after date, at the office of Winslow, Lanier, & Co., in the city of New York; which bill, at sight, was accepted by the drawee, and afterwards by the payee assigned to one Holland, who subsequently assigned it to Ezekiel Tyner, by whom it was afterwards assigned to the plaintiffs. Payment of the bill was refused at maturity, and it was protested for non-payment. Due notice was given.

The defendant pleaded eight pleas in bar of the action; the first, second, and fourth, being withdrawn, it is only necessary to notice the third, fifth, sixth, seventh, and eighth.

The third plea states that George Holland, who is one of the endorsers and co-sureties thereof, before the commencement of this suit, on the 21st day of December, 1854, fully paid the bill to the Richmond branch of the State Bank of Indiana, who was then and there the holder and owner of the same; and that the plaintiffs received the same after they became due, and were so paid.

This plea assumes that one of the endorsers and co-sureties paid the bill. In *McDonald v. Magruder*, (3 Peters, 470,) and in *Wilson v. Blackford*, (507,) the doctrine was laid down that co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. The liabilities must arise from the endorsements, and not from a distinct agreement to pay the face of the bill jointly; the plea does not necessarily import a joint undertaking; the facts on which the joint liability is founded must be stated. On the payment of the bill by the endorser, it does not cease to be assignable.

The allegations in the fifth plea are not sufficient to bar the action. Several of the matters so stated have no direct bearing on the points made. The various parties to an accommodation bill, where no consideration has passed as among themselves, are not, unless by special agreement, bound to pay in

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*McCarty et al. v. Roots et al.*

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equal proportions as co-sureties. The averments of the plea are defective in not stating there was an agreement between the drawers and endorsers of the bills of exchange to contribute equally in paying them.

Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt, impair the plaintiff's right to recover.

The sixth plea alleges that no consideration passed between said drawer, acceptor, or endorsers, for said bills, and that the same remained in the hands of R. Tyner until negotiated by him to the Richmond Bank, for his benefit. And afterwards, and before said bills became due, to wit: on the 1st of October, 1854, R. Tyner, Tyner & Childers, and E. Tyner & Co., failed, and made a general assignment of their property, rights, &c., to Holland, Abner McCarty, and R. H. Tyner; and Holland accepted the trust, and became the active trustee; that the assignments were made for the debts and liabilities, first, to indemnify and save harmless Abner McCarty; second, to indemnify and save harmless Holland, said plaintiff, and N. D. Gallion, in proportion to their respective liabilities, and next for the payment of other debts and trusts. The property so assigned is averred to have been of the value of one hundred and fifty thousand dollars, and amply sufficient to pay the bills in suit, &c., and that Holland, on July 1, 1855, delivered said bills, endorsed in blank to said plaintiff, as collateral security for a pre-existing debt of Richard Tyner to said plaintiff, all of which was known to the plaintiff.

To this plea the plaintiff replied, that the said E. Tyner & Co. did not, each nor either of them, make an assignment of their property, rights, credits, or effects, to the said Holland, McCarty, and Tyner, as stated in sixth plea of the defendant; but it is true that the said Richard Tyner, in 1854, made an assignment of said property, rights, and effects, to the said Holland, McCarty, and Tyner, and in trust: first, to indemnify and save harmless the said Abner McCarty as a creditor and surety of the said Richard Tyner; second, to indemnify and save harmless the said Holland, N. D. Gallion, Ezekiel Tyner, and the said plaintiff, as creditors and securities; but the plain-



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*McCarty et al. v. Roots et al.*

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tiff says the property, rights, credits, and effects, so assigned to the said Holland, McCarty, and Richard H. Tyner, were and still are wholly insufficient in value to indemnify and save harmless the said McCarty as such creditor and surety, so that there are now no effects or money of the said R. Tyner from which the bill could be paid, or any part thereof.

This replication was demurred to, but it was sufficient, and the demurrer was properly overruled.

In the seventh plea, which was amended, an agreement is alleged between the bank and Holland, that if Holland would give his notes to the bank, bearing six per cent. interest, with real and personal security, payable by instalments on the 1st day of January, 1856, 1857, and 1858, the bank would extend the times of payment as above stated, which was agreed to by Holland, the bank being then the holder of the bills; and that this was done without the consent or knowledge of defendant. And it is further alleged that the above bills were, after due, delivered to said plaintiff by said Holland, as collateral security for a pre-existing liability of said Holland, and for no other consideration.

To this plea there was a demurrer on the ground that there was no agreement between Holland, E. Tyner & Co., and the defendant, that on the failure of Richard Tyner to pay the bills of exchange, Holland, E. Tyner & Co., and the defendant, jointly or in equal proportions, should pay them. There was no sufficient averment to this effect. The delivery of the bills to the plaintiff, as collateral security for a pre-existing debt, under the decision of *Swift v. Tyson*, was legal. The demurrer was properly sustained.

In his eighth plea, the defendant says that the bills of exchange, in the declaration mentioned, are one and the same identical bills, and not other or different; that defendant never endorsed but one bill of the amount and date stated. He further says, that the firm of Tyner & Childers consisted of Richard Tyner, James N. Tyner, and William Childers; and that of E. Tyner & Co., of Richard Tyner, and Ezekiel Tyner, and Childers, and that said R. Tyner drew said bill in the name of Tyner & Childers, and accepted the same in his own name, and

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*McCarty et al. v. Roots et al.*

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endorsed the same in the name of E. Tyner & Co.; that each of the parties, with the said George Holland and this defendant, were, at the time of drawing, accepting, and endorsing, citizens of Indiana; that the bill of exchange was discounted by the said bank, and the proceeds paid to Richard Tyner; that said endorsers were co-sureties thereon; and it was understood the said defendants, the said George Holland and Ezekiel Tyner, were each to be co-sureties, and liable to pay a *pro rata* share of said bill; and each of said parties have, since the endorsing of said bill, admitted a liability, with the others, in case of insolvency of prior parties, for whose benefit said bill was so made to contribute towards payment.

And the defendant further says, that, before the bill became payable, the said Tyner & Childers, and the said R. Tyner and E. Tyner & Co., failed, and each of said firms made a general assignment of lands, goods, property, and effects, of the value of \$1,000 to \$5,000, to one H. J. Shirk: first, to pay depositors; second, debts for which A. McCarty and Holland were liable; and also for the payment of debts to plaintiffs, and liabilities to them, the said R. Tyner assigned property and effects, amounting in value to between \$60,000 and \$150,000, to Holland, McCarty, and R. Tyner, in trust: first, to indemnify and save harmless Abner McCarty; and, second, this defendant and George Holland, the said plaintiffs, and N. D. Gallion, in proportion to their respective liabilities for him, and then for payment of other debts upon other trusts; and Holland became active for the execution of the trust, and took up of the Richmond Bank the bill of which it was holder, and by giving new notes of the said Holland for this and other debts of the said Tyner and Holland, and others, amounting to over \$20,000, which sums were payable subsequently, with interest, and secured by mortgage on real estate conveyed by Holland to the bank, all of which was done without the consent or knowledge of the defendant.

And the defendant says that Holland, still being one of the trustees of said R. Tyner, and having property in his hands upon the trust aforesaid of greater value than the amount of the bills, afterwards, on the 1st of July, 1855, at the county

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*Pearce v. Madison & Indianapolis R. R. Co. and Peru & Indianapolis R. R. Co.*

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aforesaid, delivered said bills to the plaintiffs as collateral security for a pre-existing debt of the said R. Tyner, on which the said Holland was endorser. And the defendant says the moneys in said bills of exchange have not yet been paid by the said Holland, or any one on his behalf. To this plea there was a demurrer.

This plea but reiterates in effect the same defences which have already been disposed of in deciding upon the demurrers before noticed, and it is not perceived how any additional force can be given to them by being grouped together in one plea.

The fact that these parties were accommodation endorsers does not make them co-sureties, bound to contribute equally to the payment of the bills, without a special agreement to that effect; and there is no sufficient averment that any such agreement existed.

The averments in regard to the assignment are also defective, for they nowhere show that Holland had, at any time, sufficient funds in his hands, after complying with the terms of the trust—viz: to save Abner McCarty and others harmless—to pay this bill; and unless such a state of fact existed, there could be nothing in his hands made available for the bills.

If the fact should appear that these parties are bound to each other by a separate and distinct agreement, other than that which appears by the endorsements upon the bills, the plaintiff in error will have his remedy in an action of *indebitatus assumpsit* against the other parties to the bills. But we think the averments in the pleas noticed are wanting in precision, and do not bring the case within the rule of special agreements, which impose a joint obligation.

The demurrers are sustained, and the judgment is affirmed.

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**SAMUEL PEARCE, PLAINTIFF IN ERROR, v. THE MADISON AND INDIANAPOLIS RAILROAD COMPANY AND THE PERU AND INDIANAPOLIS RAILROAD COMPANY.**

Where two separate corporations were created to make railroads, they had no right to unite and conduct their business under one management; nor had

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*Pearce v. Madison & Indianapolis R. R. Co. and Peru & Indianapolis R. R. Co.*

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they a right to establish a steamboat line, to run in connection with the railroads.

Notes given for the purchase of the steamboat cannot be recovered upon.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

The case is stated in the opinion of the court.

It was submitted, on printed arguments, by *Mr. O. H. Smith* and *Mr. Fox* for the plaintiff in error, and *Mr. Hendricks* for the defendants.

Mr. Justice CAMPBELL delivered the opinion of the court.

The defendants are separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connect at Indianapolis, in that State. The plaintiff is the assignee of five promissory notes, that were executed under conditions set forth in the declaration, and of which he had notice. The two corporations, (defendants,) some time before the date of the notes, were consolidated by agreement, and assumed the name of the Madison, Indianapolis, and Peru Railroad Company, and under that name, and under a common board of management, conducted the business of both lines of road.

While the business of the two corporations was thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat, which was to be employed on the Ohio river, to run in connection with the railroads. After the execution of the notes, and the acquisition of the boat, this relation between the corporations was dissolved by due course of law, and, at the commencement of the suit, each corporation was managing its own affairs. The plaintiff claims that the two corporations are jointly bound for the payment of the notes, but the Circuit Court sustained a demurrer to the declaration.

The rights, duties, and obligations of the defendants are defined in the acts of the Legislature of Indiana under which they were organized, and reference must be had to these, to

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*Pearce v. Madison & Indianapolis R. R. Co. and Peru & Indianapolis R. R. Co.*

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ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils, for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority. In *McGregor v. The Official Manager of the Deal and Dover Railway Co.*, (16 L. and Eq., 180,) it was considered that a railway company incorporated by act of Parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of Parliament, must be taken to be known to the whole world. In *Coleman v. The Eastern Counties Railway Co.*, (10 Beav., 1,) Lord Langdale, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies. Lord Langdale said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has ne

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*Pearce v. Madison & Indianapolis R. R. Co. and Peru & Indianapolis R. R. Co.*

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where been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

“There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever. In the *East Anglian Railway Company v. The Eastern Counties Railway Company*, (11 C. B., 803,) the court say the statute incorporating the defendants’ company gives no authority respecting the bills in Parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void.”

We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of *Head v. Providence Insurance Company*, (2 Cr., 127,) and has been reaffirmed in a number of others that followed it. (*Bank of Augusta v. Earle*, 18 Pet., 519; *Perrine v. Ches. and Ohio Railroad Company*, 9 How., 172.)

It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner’s interest. His suit is instituted on the notes, as an endorsee; and the only question is, had the corporation the capacity to make the contract, in

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*United States v. Fossatt.*

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the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority. Judgment affirmed.

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**THE UNITED STATES, APPELLANTS, v. CHARLES FOSSATT.**

The only cases which will be taken up out of their regular order on the docket are those where the question in dispute will embarrass the operations of the Government while it remains unsettled.

But if the court below, to which a mandate is sent, does not proceed to execute it, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions before this court for correction.

No appeal will lie from any order or decision of the court below which is not a final decree.

The decree of the court below, in the present case, was not a final decree.

The jurisdiction of the board of commissioners for the settlement of private land claims in California, and of the courts of the United States on appeal, extends not only to the adjudication of questions relating to the genuineness and authenticity of the grant, and others of a similar character, but also all questions relating to its location and boundaries; and does not terminate until the issue of a patent conformably to the decree.

It is the duty of the surveyor general to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same.

THIS was an appeal from the District Court of the United States for the northern district of California.

It was the same case which was before this court at the preceding term, and is reported in 20 Howard, 418. The position of the case is explained in the second opinion of the court, as delivered by Mr. Justice Campbell.

Being so down upon the docket as that there was no probability of reaching it in the regular order of business, a motion was made to take it up out of its regular turn. This motion was argued by *Mr. Bayard* and *Mr. Nelson* in favor of it, and by *Mr. Black* against it.

*Mr. Black* (Attorney General) remarked, that he could not say that the public business of the Government was obstructed in consequence of the pendency of this appeal.

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*United States v. Fossatt.*

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Upon this motion, Mr. Chief Justice TANEY delivered the opinion of the court.

According to the rules and practice of the court, no case can be taken up out of its order on the docket, where private interests only are concerned. The only cases in which they will depart from this rule are those where the question in dispute will embarrass the operations of the Government while it remains unsettled. But when a case is sent to the court below by a mandate from this court, no appeal will lie from any order or decision of the court until it has passed its final decree in the case. And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction. Upon looking into the record in the case of *United States v. Fossatt*, the court doubt whether there has been a final decision under the mandate, and whether the present appeal ought not to be dismissed on that ground. If there is no final decree, the proceedings of the court below cannot be interrupted by an appeal from interlocutory proceedings.

The court therefore desire to hear the counsel upon the question, whether the decree in question is final, upon motion to dismiss, and will hear the argument on Monday, March 7th.

When the case came up again, the motion to dismiss the appeal, because the judgment of the court below was not final, was argued by *Mr. Bayard* and *Mr. Nelson* in support thereof, and by *Mr. Black* (Attorney General) and *Mr. Reverdy Johnson* in opposition thereto.

Mr. Justice CAMPBELL delivered the opinion of the court.

This cause came before this court by appeal from the District Court of the United States for the northern district of California, and was decided at the last term, and is reported in 20 How., 418.

The court determined :

“That a grant under which the plaintiff claimed land in California was valid for one league, to be taken within the south-



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*United States v. Fossett.*

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ern, western, and eastern boundaries designated therein, at the election of the grantee and his assigns, under the restrictions established for the location and survey of private land claims in California by the executive department of the Government. The external boundaries of the grant may be declared by the District Court from the evidence on file, and such other evidence as may be produced before it; and the claim of an interest equal to three-fourths of the land granted is confirmed to the appellee."

The District Court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made. From the decree, in this form, the United States have appealed.

A motion has been submitted to the court for the dismissal of the appeal, because the decree of the District Court is interlocutory, not final.

This motion is resisted, because the inquiries and decrees of the board of commissioners for the settlement of private land claims in California, by the act of 3d March, 1851, (9 S. at L., 632,) in the first instance, and of the courts of the United States on appeal, relate only to the question of the validity of the claim—and by validity is meant its authenticity, legality, and in some cases interpretation, but does not include any question of location, extent, or boundary—and that the District Court has gone to the full limit of its jurisdiction in the decree under consideration, if it has not already exceeded it.

The matter submitted by Congress to the inquiry and determination of the board of commissioners, by the act of 3d March, 1851, (9 Stat. at Large, 632, sec. 8,) and to the courts of the United States on appeal, by that act and the act of 31st August, 1852, (10 Stat. at Large, 99, sec. 12,) are the claims "of each and every person in California, by virtue of any right or title derived from the Spanish or Mexican Government." And it will be at once understood that these comprehend all private claims to land in California.

The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable

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*United States v. Fossett.*

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to the claimant, the land "shall be deemed, held, and considered, as a part of the public domain of the United States;" but if favorable, the decrees rendered by the commissioners or the courts "shall be conclusive between the United States and the claimants."

These acts of Congress do not create a voluntary jurisdiction, that the claimant may seek or decline. All claims to land that are withheld from the board of commissioners during the legal term for presentation, are treated as non-existent, and the land as belonging to the public domain.

Thus it appears that the right and title of the inhabitants of California, at the date of the treaty of Guadalupe Hidalgo, to and within its limits, with the exception of some within the limits of a pueblo or corporation described in the 14th section of the act of 8d March, 1851, must undergo the scrutiny of this board, and that its decisions are subject to review in the District and Supreme Courts. This jurisdiction comprehends every species of title or right, whether inchoate or complete; whether resting in contract or evinced by authentic act and judicial possession.

The object of this inquiry was not to discover forfeitures or to enforce rigorous conditions. The declared purpose was to authenticate titles, and to afford the solid guarantee to rights which ensues from their full acknowledgment by the supreme authority. The tribunals were therefore enjoined to proceed promptly, and to render judgment upon the pleadings and evidence; and in deciding, they were to be governed by the laws of nations, the stipulations of the treaty of Guadalupe Hidalgo, the laws, usages, and customs, of the Government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States in similar cases.

What are the questions involved in the inquiry into the validity of a claim to land?

It is obvious that the answer to this question must depend, in a great measure, upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or, it may involve an inquiry into the authority of

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*United States v. Fossatt.*

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the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or, it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of conditions. Questions of each kind here mentioned have been considered by the court in cases arising under this law.

But, in addition to these questions upon the vitality of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim.

In affirming a claim to land under a Spanish or Mexican grant, to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those Governments, we imply something more than that certain papers are genuine, legal, and translatative of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee.

In the case of the *United States v. Arredondo*, (6 Pet., 691,) the inquiries of this court, beside those affirming the legality of the grant, extended to questions of forfeiture for the non-fulfilment of conditions, the inalienability of lands in possession of an Indian tribe, and fraud. The Superior Court of Florida in that suit directed that the land should be surveyed, in the form of a square, with a designated monument as the centre. This court annulled that decree, and ascertained another as the central point. The appeal in *Mitchell v. United States* (15 Pet., 52) was taken in a case that had been decided here, and in which an issue upon the decree that succeeded the mandate of this court, and made in execution of it, subsequently arose. Certain property about Fort St. Mark's was excepted in the original decree of confirmation, and reserved to the United States, and the Superior Court in that decree was directed to ascertain the extent and boundaries of the land reserved. This was done and the land specifically described, and on appeal this decree was affirmed.

These questions arose upon an act of Congress that required the courts, "by a final decree, to settle and determine the ques-

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*United States v. Fossatt.*

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tion of the validity of the title according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the Government from which it is alleged to have been derived." This act enumerates as proper to be heard and decided, preliminary to such a decree, questions of extent, location, and boundary. (4 Stat. at L., 52, sec. 2.)

It is asserted on the part of the appellants that the District Court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, and consequently cannot proceed further in the cause than it has done.

The 13th section of the act of 3d March, 1851, makes it the duty of the surveyor general to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same. It was the practice under the acts of 1824 and 1828, (4 Stat. at L., 52, 284,) for the court to direct their mandates specifically to the surveyor designated in those acts. And in the case *ex parte Sibbald v. United States*, (12 Pet., 488,) the duty of the surveyor to fulfil the decree of the court, and the power of the court to enforce the discharge of that duty, are declared and maintained. The duties of the surveyor begin under the same conditions, and are declared in similar language, in the acts of 1824, 1828, and of 1851.

The opinion of the court is, that the power of the District Court over the cause, under the acts of Congress, does not terminate until the issue of a patent, conformably to the decree.

In the exercise of the jurisdiction conferred by this act, and acts of a similar character, this court has habitually revised decrees of the District Court, which were not final decrees under the judiciary act of 1789. The court has uniformly accepted, in the first instance, as a final decree, one that ascertained the authenticity of the claimant's title, and declared, in general terms, its operation, leaving the questions of boundary and location to be settled subsequently. This practice was approved in the case last cited. The peculiar nature of these cases rendered such a relaxation of the rules of proceeding of the court appropriate. The United States did not appear in

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*Sturgis v. Clough et al.*

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the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognise as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation.

They had instrumentalities adequate to the fulfilment of their engagements without delay, whenever their existence was duly ascertained. There was no occasion for the strict rules of proceeding that experience has suggested to secure a speedy and exact administration between suitors of a different character. And it has rarely occurred that the same case has reappeared in the court after the first decree. If the litigation had been other than it was, the rule of proceeding would have varied with it.

But, after the authenticity of the grant is ascertained in this court, and a reference has been made to the District Court, to determine the external bounds of the grant, in order that the final confirmation may be made, we cannot understand upon what principle an appeal can be claimed until the whole of the directions of this court are complied with, and that decree made. It would lead to vexatious and unjust delays to sanction such a practice. It is the opinion of the court that this appeal was improvidently taken and allowed, and must be dismissed; and that the District Court proceed to ascertain the external lines of the land confirmed to the appellee, and enter a final decree of confirmation of that land.

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RUSSELL STURGIS, LIBELLANT AND APPELLANT, v. JOHN CLOUGH,  
ROBERT L. MABEY, AND HENRY M. WEED, CLAIMANTS OF  
THE STEAMBOAT R. L. MABEY, HER TACKLE, &c.

Where two steam-tugs are approaching a vessel from different directions, in order to secure the contract of towing her into harbor, the established rules are, that the steamer which is following in the wake of the vessel should come up on her starboard quarter and slack her engine, whilst the steamer which is approaching from the opposite direction should round to, either to windward or leeward, so as to head the same way as the vessel.

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*Sturgis v. Clough et al.*

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In the present case, the evidence shows that the master and pilot of the last-mentioned steamer were in fault by not conforming to the established rule, and thereby caused the collision which ensued between the two steamers.

THIS was an appeal from the Circuit Court of the United States, sitting in admiralty, for the southern district of New York.

The facts in the case are set forth in the opinion of the court.

The District Court dismissed the libel, each party paying his own costs.

The Circuit Court affirmed this decree, and that the appellees recover of the libellant their taxed costs of appeal.

The libellant appealed to this court, where it was argued by *Mr. Benedict* for the appellant, and *Mr. McMahon* for the appellee.

*Mr. Benedict* contended, amongst other points, that the evidence established the custom, that when tugs met a vessel, they rounded to or went around her, so that the bows of the two vessels would be in the same direction.

*Mr. McMahon* contended that the *Hector* was in the wrong because the rule is, that when vessels are approaching each other under such circumstances, each should keep to the right; and if the *Hector* had done so, no collision would have ensued.

These were only the main points in the arguments, which branched out into many other points.

Mr. Justice GRIER delivered the opinion of the court.

The libellant in this case is owner of a steam-tug called the *Zachary Taylor*, or *Hector*.

The claimants are owners of the steam-tug *Mabey*.

At the time of this collision, on the 11th of August, 1854, they were both engaged in the business of towing vessels into the port of New York from the neighborhood of Sandy Hook.

The *Hector* was an old, heavy boat, some one hundred and eighty or one hundred and ninety feet long; the *Mabey* a new, light boat, of about one hundred feet in length, and much the swifter of the two, in the ratio of about fourteen to eight.

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*Sturgis v. Clough et al.*

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They were each looking out for employment about noon of that day, when the brig *Wanderer* was passing in, by Sandy Hook, sailing slowly in a northwest course. The two steam-tugs must have been some two or three miles apart, when they each started for the brig in different directions, in order to tender their services. Each boat put on all its steam, as the first who could hail the brig would be entitled to the job.

The *Hector*, being in the rear, came up in the wake of the brig, and nearly on her course. The *Mabey* came in S. S. E. course, meeting the brig in an acute angle to its course. As they came together near the starboard quarter of the brig, their respective distances from her at the time of starting must have been in the ratio of their velocities. The *Mabey*, being much the fastest boat, no doubt expected to make up for this difference of distance by her superior fleetness.

According to the established rules for navigating boats under such circumstances, the *Hector*, which was following in the wake of the brig, should come up on her starboard quarter, and slack her engine, so as not to pass the brig. The *Mabey*, which was coming down in the opposite direction, ought to round to, either to windward or leeward, so as to head the same way as the brig. Had these well-known rules been observed, no collision would have occurred in consequence of the race for precedence.

Cases may occur in which two steamboats engaged in unlawful racing may recklessly or wilfully dash against each other; and the courts, treating them both as criminals, may refuse to sustain an action or decide which was most to blame, leaving each to suffer the consequences of his own folly and recklessness.

We do not think that the testimony shows this to be such a case. Each of these boats had a right to move as fast as it could in order to obtain precedence, and each had a right to expect that the other would pursue the customary and proper course in navigating their vessels, in such circumstances, by the observance of which there would be no danger of collision.

Have both these boats, in their anxiety for precedence, disregarded the proper precautions to avoid a collision, or is the

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*Sturgis v. Clough et al.*

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fault wholly to be attributed to the mismanagement of the Mabey?

The defence set up in the answer, that the Mabey "got to the brig first, slacked her speed, slowed and stopped, and that the Hector attempted to pass under the bows of the Mabey, and in executing that manœuvre, with the covetous desire of getting the right to tow the brig, she ran against the Mabey, obliquely," &c., is clearly and satisfactorily proven to be not true. The fact that the stem of the Mabey, the lighter and swifter boat, was driven into the starboard bow of the Hector, stripping her guards down to the wheel, shows conclusively that the Mabey was not stopped, but was under nearly full headway.

If the collision had occurred as stated in the answer, the great momentum of the larger boat would most probably have sunk the smaller.

The witnesses on the Hector all concur that, though the engineer was directed to proceed with his utmost dispatch, the Hector followed in the wake of the brig, and when near to her had slacked her speed and stopped her wheel, so as to lap on the stern of the brig as she came alongside of her starboard quarter, and within twenty feet of her; and that she was nearly at rest when the Mabey ran, with all her force, into the starboard bow of the Hector. As these witnesses are all confirmed by the pilot of the brig, who was an impartial observer of the whole transaction, his statement may be fairly taken as a correct representation of it.

He states that he first saw the Hector about a mile distant, heading towards the brig, about northwest; that she came up to the brig in about ten minutes, stopped her engine when she came within one hundred to two hundred yards of the brig, and then came alongside with the way she had on; and the captain spoke to the witness. That the brig was going at the rate of about a mile an hour, and the Hector was dropping astern, if anything, when the Mabey ran into her.

That, when he first observed the Mabey, she was about half a mile off, coming southwest or west-southwest; that she was about an eighth of a mile from the brig when the Hector let



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*Sturgis v. Clough et al.*

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her steam off; that she continued her course till she struck the starboard bow of the Hector, and ran into her forward of the wheel-house; that, when the pilot of the Mabey discovered that he had run his boat so as to render a collision inevitable, he ran out of the pilot-house and went aft; that the wheels of the Mabey were in motion till the time of the collision; that the Hector could do nothing to avoid the collision, because she had stopped her engine and was falling behind the brig.

The master of the Hector acted on the supposition that the Mabey, according to custom, would round to, and could not anticipate that, contrary to all rule, she would run into the Hector, as she lay nearly at rest, lapping on the stern of the brig, when a single turn of her wheel, with her great headway, would have run her entirely clear of any danger of collision. Hence, when his pilot told him the Mabey was coming in a direction to run into him, he said, "No, she will go under our stern." He presumed, and had a right to presume, that the pilot of the Mabey knew his duty, and intended to round to behind the stern of the brig and tug, and not make the reckless attempt to run between them.

The testimony of the pilot of the Mabey, in fact, confirms this view of the case, and shows the collision to have been occasioned entirely by his own fault, or that of the master, who directed him. He says, "My instruction was to run close to the brig's stern." The master says, "He expected the Hector would get out of his way;" and the pilot says, "I *supposed* she would go on the other quarter, or else steer outside of me." In other words, he proceeded in a direction which he knew must produce a collision unless the Hector would get out of his way. It is clear that his intention was to drive the Hector away from the brig, or compel her to take the consequences. The pilot admits, also, that he knew the proper way to approach the brig was by rounding to; which would not have brought him within three hundred feet of the point of collision. He admits, also, that he could have gone on either side of the brig, and "knew it was nautical and customary to come up on the weather quarter, and to round to for a tow, but he had in-

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*Western Telegraph Company v. Magnetic Telegraph Company.*

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structions from the captain to go for the brig, and to get there before the Hector if he could."

We are of opinion, therefore, that the evidence clearly shows that this collision was occasioned wholly through the fault of the master and pilot of the Mabey.

The decree of the Circuit Court is therefore reversed, with costs, and the record remitted with instructions to enter a decree in favor of libellant, and have such further proceedings as to justice and right may appertain.

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**THE WESTERN TELEGRAPH COMPANY, APPELLANTS, v. THE MAGNETIC TELEGRAPH COMPANY AND ARUMAH S. ABELL AND ZENUS BARNUM.**

Where there was a telegraph company from Baltimore to Wheeling, with branches to Washington and Pittsburg, and another company from Pittsburg to Philadelphia, and from Harrisburg to Baltimore; and the former company complained that the latter received messages at Philadelphia, sent from Pittsburg and Wheeling, directed to Baltimore and Washington; and there was no direct infringement of the patent right, nor any violation of a contract, the case is without a legal remedy.

Every person is at liberty to use a circuitous route, if he prefers it to a shorter route.

THIS was an appeal from the Circuit Court of the United States for the district of Maryland.

The case is stated in the opinion of the court.

It was argued by *Mr. Cornelius McLean* for the appellants, no counsel appearing for the appellee.

*Mr. McLean's* points for the complainants and appellants were the following:

1st. That they are, under their assignment, entitled to all the business between Wheeling and Pittsburg, and Washington and Baltimore.

The defendants could not have set up a parallel line of telegraph between those points, and the question is simply whether

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*Western Telegraph Company v. Magnetic Telegraph Company.*

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they can do indirectly and by combination what they could not do directly.

This court has decided that question, where a slave was brought into Alexandria, which the master had a right to do, by referring it to the jury to find whether the slave had been brought there for the purpose of being introduced into Washington county, of the District of Columbia. (*Lee v. Lee*, 8 Peters Sup. Co. Rep., 44.)

In that case, the court take the ground that what cannot be done directly cannot be done indirectly. (*United States v. Quincy*, 6 Peters Supreme Co. Rep., 466; *The William King*, 2 Wheat., 148.)

It has been decided in Maryland, that although a man may part with his personal property, yet he cannot give it away to defraud his wife. (*Feigley v. Feigley*, 7 Md. Rep., 561.)

It will be contended that the contract and combination alleged on the bill is an indirect way of doing what could not be directly done, and an infringement of the complainants' rights, so as to destroy the value of their patent.

2d. It will be contended, as claimed in the bill, and as a corollary from the first claim, that the complainants, being entitled to the carrying of telegraphic messages between those points, have also the right to the carriage of all messages reaching those points, and destined for other points on their said line, or other points to which their line is the shortest and most direct route; and that the defendants cannot lawfully combine, as alleged in the bill, with others, to divert them from the complainants' line.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the district of Maryland.

(On the 30th of April, 1849, a contract was entered into between Amos Kendall, as attorney in fact for Samuel F. B. Morse and Alfred Vail of the first part, and the Western Telegraph Company of the second part.

In the agreement, it was stated that the United States had heretofore granted to Samuel F. B. Morse letters patent for the

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*Western Telegraph Company v. Magnetic Telegraph Company.*

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magnetic telegraph, known as Morse's Telegraph; and that the said Morse subsequently assigned a portion of his interest in the said letters patent to Alfred and Leonard V. Gale; and the said Morse, Gale, and Vail, subsequently, by letters of attorney, recorded among the transfers of patent rights, constituted Amos Kendall their true and lawful attorney, for them and in their behalf, &c. And whereas the said Western Telegraph Company are desirous to obtain, in due form, the privileges of said letters patent for lines of telegraph belonging to them between Baltimore and Wheeling, with a branch therefrom to Washington city, and a branch from Brownsville to the city of Pittsburg:

Now, the said Amos Kendall, in consideration of thirty-six thousand dollars paid to him in the stock certificates of the Western Telegraph Company, hath, as far as he possesses legal authority, by virtue of the power of attorney aforesaid, or otherwise, granted, assigned, and conveyed, to the Western Telegraph Company, the full and exclusive right to use the invention of the said Morse, secured by letters patent on the said lines from Baltimore to Wheeling, with branches to Washington and Pittsburg, respectively, for the remainder of the time yet to come in the said letters patent, with the benefit of any extensions and renewals thereof, it being understood that the right granted is to be for one wire only, unless with the consent of the patentee.

And Francis O. J. Smith conveyed his right to the Western Telegraph Company's existing lines from Baltimore, in the State of Maryland, to Wheeling, in the State of Virginia, and in branches to Washington and Pittsburg cities, in full right, on the 27th of March, 1857.

These conveyances vested in the Western Telegraph Company all the right which the patentee had, on the conditions stated, to use and enjoy the lines designated for the transmission of telegraphic messages, in as full and ample a manner as the patentee could himself have enjoyed, had no assignment of his right been made.

But it is alleged that another assignment of Morse's patent was made to a company from Pittsburg to Philadelphia, and

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*Western Telegraph Company v. Magnetic Telegraph Company.*

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to another company from Harrisburg to Baltimore, and that, by conspiring with those companies, the Magnetic Company has taken messages at Philadelphia, sent from Pittsburg and Wheeling, directed to Baltimore and Washington, and other similar messages from the Harrisburg line directed to Washington; and also messages from Washington and Baltimore, by Philadelphia and Harrisburg, to Wheeling and Pittsburg, and through those points to points further west; and that this was done by uniting the lines or working them together, under a contract, in order that they might get, in conjunction with the other companies, the whole of the business between those points.

The complainants do not seem to be well advised as to what means of combination, conspiracy, or contract, the injury complained of has been done; but they charge that, by the means alleged, their lines have in a degree been destroyed. They are only able to say that the business on their lines has been diverted by the magnetic lines. And the equitable powers of the court are invoked against the injuries complained of.

The bill does not allege any direct infringement of the patent owned by the Western Telegraph Company by the Magnetic Company. Those lines are free to transmit any messages that may be forwarded on them. But the complaint seems to be, that at the points where the operations of the Western Telegraph cease, whether it be east, north, or west, the messages are not forwarded by the Western Telegraph, but they are, by the means used, diverted from those lines, and sent by circuitous routes, or at least by lines of increased length.

It must be expected that great competition will exist in the transmission of intelligence, where telegraphic lines have been established throughout the country. But it would be difficult to find a remedy for these evils, whether real or supposed, which are not founded on contract. It was in the power of the Western Telegraph Company to form connections with other lines, so as to secure uninterrupted communications. But if these precautions have not been observed, and a supposed convenience or dispatch has been deemed a sufficient security for the co-operation of the lines connected with the Western Tele-

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*Western Telegraph Company v. Penniman et al.*

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graph Company, and no contract, express or implied, is shown, the complainant is without remedy.

Men, unless legally bound to certain duties, may, from whim or caprice, indulge their supposed interests or resentments without responsibility. Unless certain rates of transmitting intelligence have been established, a reduction of such rates, whether done secretly or publicly, will affect the profits on other lines.

Nothing set up in the bill, in the form of a contract, entitles the complainant to relief. A choice of lines may well be exercised, if there be no violation of the patent, although the circuitous line passes over a greater distance, as this can be no ground of complaint. It violates no contract, and almost necessarily grows out of the competition in this branch of business.

From the facts stated in the bill, there seems to be no ground for relief. Judgment affirmed.

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THE WESTERN TELEGRAPH COMPANY, APPELLANTS, v. GEORGE C. PENNIMAN AND JOHN KING.

The decision in the preceding case again affirmed.

THIS case, like the preceding, was an appeal from the Circuit Court of the United States for the district of Maryland, and was a branch of the same case.

The case is stated in the opinion of the court, and was argued by the same counsel as the preceding.

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us by an appeal from the Circuit Court of the United States for the district of Maryland.

The Western Telegraph Company, a corporation incorporated by the States of Maryland, Virginia, and Pennsylvania, have filed their bill against George C. Penniman and John King, citizens of Maryland, and charges them with the violation of the patented rights of the Western Telegraph Company,

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*Western Telegraph Company v. Penniman et al.*

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under a contract made with Morse, Vail, and Smith, dated the 8th of March, 1840. The above-named persons are alleged to be the sole proprietors of the right to construct and use Morse's electro-magnetic telegraph, by him invented and patented, on the route between Baltimore, in the State of Maryland, and New York and Harrisburg, in the State of Pennsylvania, for and in consideration of thirty dollars per mile, by the route on which the telegraph has been or may be constructed, between the points or places aforesaid. And said right, through their agent, Amos Kendall, was conveyed unto John C. Penniman and his assigns, to construct between the points or places aforesaid the said telegraph, with one or more wires, with the apparatus for working the same and the improvements therein. And the said Morse & Co. covenant not to grant to any other person or persons the right to construct any other line of telegraph under the patent aforesaid, within the aforesaid limits, either in a direct or indirect line.

The contract between Kendall, as attorney of Morse and Vail, with the Western Telegraph Company, granted to it in due form the privileges of said letters patent for lines of telegraph belonging to it, between Baltimore and Wheeling, with a branch therefrom to Washington city, and a branch from Brownsville to the city of Pittsburg, &c.; and the right of Francis O. J. Smith, which was also conveyed, was limited to the Western Telegraph Company's existing lines from Baltimore, in the State of Maryland, to Wheeling, in the State of Virginia, and in branches to Washington and Pittsburg cities; the right herein conveyed and so limited by said territorial termini being one-fourth part of said invention and letters patent, &c.

The complainants pray for an injunction, and that an account may be taken, for a breach of its patent privileges.

The defendants procured an assignment of Morse's patented electro-telegraph between the cities of Baltimore and Harrisburg, and afterwards a like assignment from him between Baltimore and Wheeling, with the right of a branch to Pittsburg and Washington; and it is alleged that complainants claim the right to telegraphic business on the Morse plan between

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*Western Telegraph Company v. Penniman et al.*

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those points; not only all that commence and end at these several points, but all that, starting at remote points, has to reach either of those points by coming through either of the others.

There can be no doubt that the right of transmitting on the lines conveyed to the Western Telegraph Company are as full and ample as would have been the rights of the patentee, had he never assigned them.

The assignment of Morse's to a company from Pittsburg to Philadelphia, and from Washington to Baltimore, Philadelphia, and New York, it is alleged, has enabled the defendants to take messages at Harrisburg from Wheeling, directed to Baltimore and Washington, and other southern points; and has also, in like manner, taken messages from the Magnetic Company between Washington and New York at Baltimore, and transit them to Pittsburg, and to points west, through Pittsburg. And this was done, it is said, in conjunction with the said companies, in order to get the business which, but for said combination, would and ought to have come by the complainants' line.

The charges against Penniman and King are, substantially, the same combinations as charged against the agents of the Magnetic Company; and we can only say, as was said in the other case, the assignees may claim a protection in all the rights assigned to them; and if, in any respect, their patent has been infringed, a remedy is open to them. But it does not appear that the defendants were limited as to the use of the lines owned by the Western Telegraph Company, although the points on their lines were shortest. Each person, in using a telegraph line, is free to select his own conveyance. There are several things which recommend telegraphic lines. The machinery should be kept in proper order; strict attention should be given to the transmission of messages, and competent persons engaged in the office. Where there is much competition, great energy is required; and if this be wanting, success may not be expected.

The principal ground of complaint in the bill is, that the business of the Western Telegraph Company has been divert-



*Converse v. United States.*

ed from it, and thrown upon other lines, greatly to its injury, and it would seem that circuitous routes have been selected, rather than the more direct ones. If this be so, does it afford a ground for relief? There is no obligation on a person sending a telegraphic message to select the shortest or the longest line. He may consult his own interest or choice in such a matter, and he incurs no responsibility to any one, unless he has entered into a contract to forward all such messages on a particular line. No such allegation is contained in the bill, and there is no charge that the Western Telegraph Company has been molested in the exercise of its patented rights, except by the transfer of its business to other lines; and it is not alleged that these lines are prohibited from carrying messages by reason of their contiguity to the plaintiffs' lines.

Judgment affirmed.

**JAMES C. CONVERSE, ADMINISTRATOR OF PHILIP GREELY, DECEASED, PLAINTIFF IN ERROR, v. THE UNITED STATES.**

1. The provisions in the appropriation acts of 1849 and 1850, &c., &c., must be construed in connection with the previous laws in relation to the same subject matter.
2. A compensation for extra services where no certain compensation is fixed by law cannot be allowed by the head of a Department to any officer of the Government who has by law a fixed or certain compensation for his services in the office he holds. Nor can it be allowed by the court or jury as a set-off in a suit brought by the United States against an officer for public money in his hands.
3. No allowance beyond his fixed compensation can be made except for the performance of certain duties required by law to be performed, for which the law grants a certain compensation to be paid, and which have no connection with the duties of the office he holds.
4. The Secretary of the Treasury, under the acts of Congress above mentioned, was authorized to appoint an agent to purchase all the supplies necessary for the light-house service throughout the United States, and to make the necessary disbursements therefor. And such agent was entitled to a compensation of two and a half per cent. on the amount disbursed, and the money was appropriated to pay it.
5. The Secretary had a right, under these laws, to select as agent any one already holding office, if he supposed him to be best qualified for the duty. But he had

*Converse v. United States.*

no right to order a collector of the revenue, or any other officer of the Government, to perform this duty without compensation outside of the light-house district of which he was superintendent, or outside of and alien to the office he held.

6. The collector of Boston, having been the agent selected by the Treasury Department to purchase supplies for the light-house service throughout the United States, and to make the disbursements, is entitled to the compensation fixed by law for this service, so far as it was outside of his district and beyond the limits to which his duties as an officer extended.
7. It has not been the policy of the United States to give unlimited power to the heads of departments over the subordinate officers of the Government whose salaries and duties are regulated by law.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Massachusetts.

The case is explained in the opinion of the court.

It was argued by *Mr. Russell* and *Mr. Cushing* for the plaintiff in error, and submitted by *Mr. Stanton* on a brief by *Mr. Black* (Attorney General) for the United States.

The examination, by the counsel, of the various acts of Congress bearing upon the point in dispute is rendered unnecessary by the investigation of them contained in the opinion of the court, and also in the opinion of the dissenting judges.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The pleadings and facts in the case, and the points in controversy, are briefly yet clearly stated in the exception and opinion of the court, as set forth in the transcript, in the following words:

"Be it remembered, that at a term of the Circuit Court of the United States, holden at Boston, within and for the district of Massachusetts, on the 15th day of May, 1857, by the Honorable Benjamin R. Curtis, circuit judge, and the Honorable Peleg Sprague, district judge, came the United States of America, and by an action of assumpsit declared against James C.

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*Converse v. United States.*

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Converse, of Boston, in said district, as he is administrator of the goods and estate of Philip Greely, jun., late of said Boston, deceased, and late collector of customs at said Boston, in said district, as by the writ and declaration of record will appear; to which the defendant pleaded the general issue, and filed certain claims in set-off, as by said set-off of record will appear; and the plaintiffs joined in said issue, and thereupon said cause came on for trial before the said Circuit Court, at said May term, before a jury empannelled for that purpose, and the said defendant then and there claimed to be allowed, among other things, in set-off against the plaintiffs' claim, the sum of seventeen thousand six hundred and eighty-four dollars and ninety-two cents, (\$17,684.92,) as commissions due him from the plaintiffs upon certain contracts, purchases, and disbursements, made by him for oil and other articles for the light-house service of the United States, under direction of the Secretary of the Treasury.

"At the trial it appeared by the transcript from the Treasury Department of the plaintiffs, introduced by them in evidence, that said claims had been duly and properly presented by the defendant's intestate, Mr. Greely, at the Treasury Department, for credit and allowance, and had there been disallowed, and no objection was made by the plaintiffs to the defendant's right to recover of the plaintiffs upon this ground.

"It also appeared that the defendant's intestate, as collector, had, during each year he was collector, received the compensation of six thousand dollars, and also the sum of four hundred dollars allowed by law.

"No question was made as to the amount of commissions claimed. The plaintiffs, in their transcripts, admit that the sum of \$17,684.92 is two and a half per cent. commission upon the defendant's disbursements for light-house purposes during his term of office, and no objection was made that that is not the proper commission, if the defendant is entitled to any.

"It was further admitted that the defendant was, from May 1st, 1849, to April 1st, 1858, superintendent of lights and disbursing agent for the district of Boston.

"The duties of this office, it was offered to prove, were the

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*Converse v. United States.*

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charge and superintendence of all light-houses between Eastham and Plum Island, Newburyport, including the making of all necessary disbursements for the payment of the keepers' salaries, wages of men, repairs, and the necessary supplies, in the same manner as other superintendents and disbursing agents in their respective districts.

"The defendant then offered to prove the following facts in regard to these disbursements upon which the aforesaid commission was claimed.

"The Secretary of the Treasury, or the proper officer under him, during the whole term of the defendant's office, was accustomed from time to time to send specific orders to him to advertise for proposals, make contracts for and purchase all the oil, lamps, wicks, and supplies of every kind, required for the whole light-house service of the United States, as well that of the sea coasts as the lakes and rivers.

"Agreeably to such orders or requests, the defendant did, from time to time, make all these contracts and purchases, draw the necessary contracts, and all payments and disbursements thereunder and therefor, take charge of the property when purchased, and distributed the same in such quantities and to such points, all over the United States, as were required or directed by the Treasury Department. These services involved much time, labor, and responsibility, on the part of the defendant, and were performed at the request and upon the order of the Treasury Department. The defendant paid out no moneys which have not been allowed.

"And it was upon all disbursements thus made that he claimed the aforesaid two and a half per cent. commissions, amounting to \$17,684.92.

"The plaintiffs objected to this evidence, because they said admitting all that was thus proposed to be proved, it gave the defendant no claim whatever to the commissions claimed.

"The court thereupon, after consideration, ruled and decided that, admitting all that the defendant thus offered to prove to be true and as alleged, yet the defendant had no rightful claim against the plaintiffs to the said commissions, or any part thereof, and could not recover the same in set-off, but that the defend-

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*Converse v. United States.*

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ant, being the collector of customs, and, as such, having received the aforesaid compensation of \$6,000 and of \$400 each year, could not recover any sum whatever for the commissions claimed as aforesaid; and the court thereupon refused to admit the evidence offered, and instructed the jury, in accordance with said ruling, and for the reasons therein stated, that the defendant could not recover for said commission.

"To which ruling, decision, and instruction, the defendant then and there excepted."

The question to be decided on this exception is undoubtedly one of some difficulty. But the difficulty arises not so much from ambiguity of language in any one of the acts of Congress, as from the great number of acts passed from time to time on this subject, which have been referred to in the argument. They, for the most part, differ in language in some degree from one another, and are generally introduced in some clause or proviso of the usual annual appropriation law, or an appropriation to provide for previous expenditures, and yet all bear, with more or less force, on the question before us.

The acts referred to are: 1822, 3 Stat., 696; 1839, 3 Stat., 439; 1841, 5 Stat., 432; 1842, 5 Stat., 510; 1845, 5 Stat., 736; 1848, 9 Stat., 297; 1849, 9 Stat., 365, 367; 1850, 9 Stat., 504, 542, 543; 1851, 9 Stat., 629; 1852, 10 Stat., 97, 100; 1852, 10 Stat., 119, 120.

It is obvious, therefore, that in order to carry into execution the intention of the legislative department of the Government, these various laws on the same subject-matter must be taken together and construed in connection with each other. And we should defeat instead of carrying into execution the will of the law-making power, if we selected one or two of these acts, and founded our judgment upon the language they contained, without comparing and considering them in association with other laws passed upon the same subject.

It would extend this opinion to an unreasonable length, to quote at large the language of the various acts and provisos above mentioned; nor indeed do we deem it necessary, because the object and policy of this whole legislation, when taken together, will be made evident by looking to the state

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*Conover v. United States.*

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of the law before and at the time the different laws were passed, and the defects which then existed, and which they were intended to remedy. A particular reference to a few of them, in chronological order, will be sufficient for this purpose, and we shall refer to those which have been mainly relied on by the Circuit Court, or by the counsel for the United States, in order to support the judgment of the court below.

The first law upon this subject is the act of May 7, 1822, section 18, which provides that "no collector, surveyor, or naval officer, shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity."

At the time this law was passed, the collectors, surveyors, and naval officers, were, in certain contingencies mentioned in the act of March 2, 1799, required to do the duties of the offices of each other; and, without any special law upon the subject, it was the settled practice and usage of the Government to require collectors to superintend lights and light-houses in their respective districts, and to disburse money for marine hospitals and the revenue-cutter service; for which, by the practice and regulations of the Treasury Department, they were allowed certain commissions. But there was no act of Congress imposing these duties on the collector, or fixing his commissions for these services and disbursements. They were charged as extra services—that is, as not belonging to the office of collector, and the amount of his compensation depended altogether upon the discretion of the Secretary of the Treasury for the time being. These extra allowances in some instances amounted to very large sums; and it appears that the attention of Congress was at length attracted to this subject, and it was deemed right, and more consistent with the nature and character of our institutions, to fix by law the compensation for these services, and not leave it in every case to depend upon the discretion of the Secretary, and the act of 1822 was accordingly passed for that purpose, and for that purpose only. The language is clear, precise, and appropriate, and no multiplication of words could more plainly indicate its

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*Converse v. United States.*

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object. The words "any other office" were evidently used with reference to the contingencies in which one of these officers might be required to perform the duties imposed by law on one of the others. And the words "or other capacity" were equally essential, in order to embrace the extra allowances made for the agency of which we have spoken, as they were not the duties of an office created by law, but a mere agency of one of the departments of the Government. The law does not forbid compensation for extra services which have no affinity or connection with the duties of the office he holds. On the contrary, it recognises his right, and gives the collector or other of these revenue officers an additional sum, over and above their salaries as officers, for extra services rendered as agents, which had no legal connection with their respective offices.

The duties for which this certain compensation was fixed were well known in the usages and practice of the Government, and Congress could therefore act advisedly and with knowledge, and judge what amount of money would be a fair compensation. But it will hardly be supposed that Congress, by this law, intended to fix this amount for every unforeseen and possible service, or the duties of every possible office which one of these revenue officers should be directed or requested by the Secretary in some emergency to fill; for, as Congress could not foresee what might be the character and importance of such a duty, there was no basis on which a judgment of its value could be formed. Nor can it be supposed that they intended to regulate in advance its compensation or value without some data to act upon.

Besides, no other salaried officer is mentioned in this law but collectors, surveyors, and naval officers; and it would hardly be just to the legislative body to impute to it the design of dealing more harshly with these revenue officers than any other officers of the Government who have certain salaries, or to suppose they would deny to them compensation in cases where every other salaried officer was allowed to claim and receive it.

We have dwelt more particularly on this act of Congress,

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*Converse v. United States.*

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because the principles and policy on which it was passed form the basis of all the subsequent legislation on this subject, and will be found, with some modification, in every law. The great object has been to establish, by law, the compensation for public services, whether in offices or agencies, where the nature and character of the duties to be performed were sufficiently known and definite to enable Congress to form an estimate of its value, and not leave it to the discretion of the head of an executive department.

After this act of 1822, there is no act of Congress bearing upon the question until 1839. In the mean time, about the year 1838, and subsequently to that time, several cases came before the Supreme Court, in which officers who were not named in the act of 1822, but who received a fixed salary as a clerk in a department, or a fixed compensation as an officer in the army, or in some other office, claimed the right to set off against the United States compensation for extra services undertaken by the direction of the Secretary, and for which there was no fixed compensation by law. And in these cases this court held that such compensation might be claimed and set off under the act of Congress allowing set-offs against the United States; and that, where the extra service had been required by the head of the proper department, the officer was entitled to a reasonable compensation, to be allowed by the jury upon the evidence, even if there was no law expressly requiring the service or fixing compensation for it; and that it might be ascertained and allowed by the jury in proper cases, under the direction of the court, even if the head of the department had fixed no compensation, and refused to allow the claim.

Under these decisions, claims of this description were frequently made, and the United States involved in inconvenient controversies in court. These controversies again attracted the attention of Congress to the subject of compensation for extra services; and in 1839 they passed an act, embracing all persons holding office with a fixed salary, precisely similar in its principles with the act in relation to custom-house officers—that is to say, they took away from the heads of departments,



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*Converse v. United States.*

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and from courts and juries, the right to fix the compensation in any case where it was not fixed by law; and if there was no law ascertaining the compensation or allowance for the particular service, the party was entitled to none. It carries out the principle and policy of the act of 1822, and provides that there shall be no compensation in addition to the salary, "unless said extra allowance or compensation be authorized by law."

Nor does the act of August 23, 1842, (5 Stat., 510,) go further than the act of 1839, except only in declaring that, in order to entitle the party to demand compensation, it must not only be fixed by law, but that the law appropriating it shall explicitly set forth that it is for such additional pay, extra allowance, or compensation. Now, these words, added to the provisions in the act of 1839, only show that the Legislature contemplated duties imposed by superior authority upon the officer as a part of his duty, and which the superior authority had in the emergency a right to impose, and the officer was bound to obey, although they were extra and additional to what had previously been required. But they can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law.

This provision is introduced in the annual appropriation law for the support of the army and Military Academy. And although the words are general, and undoubtedly include officers in every branch of the public service, yet, from the general character and objects of this law, it is manifest that the attention of Congress must have been mainly directed to officers in the military service, who, from the position in which unforeseen events often place them, are called upon and required to perform duties not specified by law or regulation, but which grow out of, and are associated with, military service.

We pass on to the acts of 1848 and 1849, which are the more important because they were passed about the time this collector came into office, and apply particularly to the reve-

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*Converse v. United States.*

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nue officers of which we are speaking. The clauses which bear upon this question in each of these laws is inserted in the annual civil and diplomatic appropriation law, by way of proviso to the clause making appropriations to the maintenance of the light-house service. The act of 1848 appropriates \$11,640.35, being a commission of two and a half per cent. on the whole amount appropriated for that service, with a proviso that no part of the sum thereby appropriated should be paid to any person who received a salary as an officer of the customs; and that from and after the 1st day of July, 1849, the disbursements should be made by the collector of the customs, without compensation. And if this law still remained in force, it is very clear that the agency of which we are speaking would not have been authorized by law, and the set-off claimed by the plaintiff in error could not be allowed.

But this proviso in the act of 1848 is recited at large in the appropriation of 1849, and repealed without any saving or qualification; and this repealing clause is immediately preceded by an appropriation for superintendents' commissions of \$11,673.25, being two and a half per cent. on the whole amount appropriated for light-house purposes. There is no restriction in these commissions in relation to revenue officers. The commissions are to be paid on the whole amount, without any reference to the person or officer who performs the service; consequently, under this law the revenue officer who performed this duty within his own district was entitled to two and a half per cent. commission on the amount disbursed; and previous acts of Congress restricting this allowance were repugnant to this law, and thereby repealed. The repeal of the act of 1848 could not, upon any sound principle of law, revive any previous act which was repugnant to the provisions contained in the repealing act of 1849. And this act allowed the commission of two and a half per cent. in all cases, and appropriated the money to pay it, leaving it to the Secretary of the Treasury to select as agent each collector for his collection district, or any other agent that he might deem more suitable for the trust.

The act of September 28th, 1850, however, restored the provisions contained in the first act referred to—that is, the act of

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*Converse v. United States.*

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1822—and provides that no collector shall receive for his services as superintendent of light-houses over the sum of \$400 per annum. But this act was followed by the civil and diplomatic appropriation law, passed at the same session, September 30th, 1850, only two days after the law above mentioned, in which the compensation is again modified in amount, and collectors whose salary exceeds twenty-five hundred dollars can receive no compensation as superintendent of lights or disbursing agent. Yet this law, like the preceding appropriation laws, appropriates a sum equal to two and a half per cent. commission upon the whole amount appropriated for light-house service, and the Secretary might therefore employ any agent he pleased; and if he was not the collector, he would be entitled to full commissions. The same provisions are contained in the appropriation acts of 1851, (9 Stat., 608,) 1852, (10 Stat., 86,) and 1853, (10 Stat., 200.)

It will be seen, from this history of the complicated legislation on this subject, that, however varying the provisions may be in some particulars, they are yet all founded on the principles and policy of the acts of 1822 and 1839, and that all of the provisos respecting the commissions to a revenue officer are confined to his collection district, and its extra customary duties therein as agent.

The just and fair inference from these acts of Congress, taken together, is, that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws, and the remuneration for them fixed by law. It was undoubtedly within the power of the department to order this collector, and every other collector in the Union, to purchase the articles required for light-house purposes in their respective districts, and to make the necessary disbursements therefor. And for such services he would be entitled to no compensation beyond his salary as collector, if that salary exceeded \$2,500.

But the Secretary was not bound to intrust this service to the several collectors. He had a right, if he supposed the public interest required it, to have the whole service performed by

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*Converse v. United States.*

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a single agent; for while the law authorizes him to exact this service from the several collectors, it at the same time evidently authorizes him to commit the whole to an agent or agents other than the collectors, by regulating the commission which an agent shall receive, and appropriating money for payment of commissions of two and a half per cent. upon the whole amount authorized to be expended in this service. And as the collectors would by law be entitled in some cases to nothing, and in others to the small sum above mentioned, if the service was performed by them in their respective districts, it is very clear, from the commissions allowed, and the appropriation to pay them, that he was at liberty to employ a different agency, and pay the commissions given by the law whenever he supposed the public would be better served by this arrangement.

And the case as assumed in the record is precisely that case. The Secretary had no right, under the laws upon this subject, to order this or any other collector to perform this duty for all the light-house and collection districts. The law has divided it among them, and the executive department had no right to impose it upon one. But he had a right, as we have said, to employ an agent, instead of the collector or collectors of the several districts; and if he did employ one, the law fixed the compensation, and appropriated the money to pay it. He was not forbidden to employ a revenue officer for this purpose; and, so far as his services were performed for other districts, he stood in the same relation to the Government as any other agent. The law forbidding compensation, or reducing it to a small amount, did not apply to this service. The agency was entirely foreign to his official duties, and far beyond the limits of the district to which the law confined his official duties and power. And as the department appointed him to perform a duty required by law, for which the compensation was fixed by law, and the money appropriated to pay it, he is entitled to the compensation given by law, if he has performed the duty; for the Secretary has no more discretionary power to withhold what the law gives, than he has to give what the law does not authorize. The

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*Converse v. United States.*

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agency and services performed in this instance had no more connection with his official duties and position than the purchase of a supply of shoes for the troops in Mexico, in the late war, would have been, in the absence of any other person authorized to make such a purchase. And if such a duty was requested or required of him by the head of the proper department, and performed, nobody would deny his right to compensation, if the law authorized and required the service to be done, and fixed the compensation for it.

Upon the case, therefore, as the plaintiff in error offered to prove it, we think the court erred in refusing to admit the testimony.

Undoubtedly, Congress have the power to prohibit the Secretary from demanding or receiving of a public officer any service in any other office or capacity, and to prohibit the same person from accepting or executing the duties of any agency for the Government, of any description, while he is in office, and to deny compensation altogether, if the officer chooses to perform the services; or they may require an officer holding an office with a certain salary, however small, to perform any duty directed by the head of the department, however onerous or hazardous, without additional compensation. But the legislative department of the Government have never acted upon such principles, nor is there any law which looks to such a policy, or to such unlimited power in the head of an executive department over its subordinate officers.

No explanation is given of the principle upon which the four hundred dollars additional compensation was allowed. If the services were regarded as extra and additional, and within the prohibition of the law, then he was not entitled to this additional allowance, because his salary exceeded twenty-five hundred dollars, and nothing more than the salary fixed ought to have been allowed him. But if they were not within the prohibition, but for services in a different agency, then he was entitled, not merely to four hundred dollars, but to the commissions fixed by law. This sum could not have been allowed for supplies in his own district, excluding those for other districts, because, as regards his own district, there is an express prohi

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*Concess v. United States.*

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bition as above stated. We, however, express no opinion upon that particular item; and whether it is a proper allowance or not, must be determined by the Circuit Court, when it hears the evidence at the trial.

For the reasons above stated, the judgment of the Circuit Court must be reversed.

Mr. Justice CATRON, Mr. Justice GRIER, and Mr. Justice CAMPBELL, dissented.

Mr. Justice CAMPBELL dissenting.

I dissent from the opinion and judgment of the court in this case. The opinion of the presiding judge of the Circuit Court, in my judgment, contains an exact exposition of the law of the case. Justices Catron and Grier authorize me to say they concur in this dissent, and we adopt that opinion as our opinion, which is in the following words:

This is an action for money had and received to the use of the United States, by Philip Greely, jun., the defendant's intestate, while collector of the customs for the port of Boston and Charlestown.

A number of items were in question when the case was opened, but in the progress of the trial all were disposed of to the satisfaction of both parties, save a charge made by the intestate, of \$17,968.92, as commissions on disbursements made by him under the orders of the Secretary of the Treasury, in the purchase of oil and other materials for light-houses. The question is, whether the collector was entitled, by law, to make this charge against the United States for that service. Mr. Greely held the office of collector from May 1, 1849, to May 1, 1853.

By the act of March 3, 1841, sec. 5, (5 Stat. at L., 482,) it was enacted, that "no collector shall, on any pretence whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than six thousand dollars per year, including all commissions for duties, and all fees for storage, or fees or emoluments, or any other commissions, or salaries, which are now allowed by law."

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*Converse v. United States.*

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The act of August 28, 1842, sec. 2, (5 Stat. at L., 510,) is as follows: "That no officer in any branch of the public service, or any other person, whose salary, pay, or emoluments, is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth, that it is for such additional pay, extra allowance, or compensation."

It being admitted that Mr. Greely was an officer whose salary, pay, or emoluments, was or were fixed by the law, and that he had received its full amount of six thousand dollars, independent of the charge in question, it is incumbent on the defendant to show, not only that the service was authorized by law, but also that the appropriation for that service explicitly sets forth that it is for such additional pay, extra allowance, or compensation. It is not enough to find an act of Congress authorizing a service, and making an appropriation to pay for it. This would be sufficient, provided the person rendering the service were not an officer, or other person, entitled to a fixed compensation. If he be, and he claims an extra compensation for an extra service, he must produce an appropriation which explicitly sets forth that it is made for such additional compensation; that is, he must show not only that Congress contemplated and provided for a service, and payment therefor, but that they contemplated and explicitly provided that if it should be rendered by one already entitled to a fixed compensation, he should nevertheless receive, in addition thereto, the compensation provided for such service. And the addition of such compensation to a fixed compensation is not to be inferred from any equitable considerations, but must be found explicitly declared in the law itself.

Such, in my judgment, is the fair interpretation of the language of this act; and the history of the legislation of Congress upon this subject of the extra compensation of officers makes this interpretation, if possible, still more plain and necessary.

The defendant relies on the following clause in the appropriation act of March 8, 1849, (9 Stat. at L., 867:) "For super-

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*Converse v. United States.*

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intendents' commissions, at two and one-half per cent. on the \$466,930.08 appropriated above for light-house purposes, \$11,673.25. And the proviso contained in the act making appropriation for the civil and diplomatic expenses of the Government, for the year ending the 30th day of June, 1849, and for other purposes, approved, &c., which proviso is in the following words: 'Provided, that no part of the sum hereby appropriated shall be paid to any person who receives a salary as an officer of the customs; and from and after the 1st day of July, 1849, the said disbursement shall be made by the collectors of the customs without compensation, is hereby repealed.' "

The argument of the defendant's counsel is, that the express repeal of this proviso is equivalent to an explicit declaration that parts of the sum appropriated by this act might be paid to persons who received salaries as officers of the customs, and that it was not to be disbursed by collectors without compensation.

But, certainly, this appropriation does not "explicitly set forth that it is for additional pay, extra allowance, or compensation." If this appears at all, it is only inferentially; and the inquiry is, whether it be a necessary inference that some part of this sum was appropriated as additional pay or extra compensation to collectors who should perform the service of superintendents of lights.

Now, the proviso which was repealed consisted of two parts. The first related exclusively to commissions in the disbursement of the appropriation for light-house expenses made for the fiscal year ending on the 30th day of June, 1849; and it prohibited the payment of any commissions out of the sum thus appropriated, to any officer of the customs who received a salary.

The second part of the proviso positively required the service of making disbursements as superintendents of lights to be performed by collectors of customs, after July 1, 1849, without compensation. It left no discretion with the Secretary of the Treasury to appoint any other person to discharge this duty.



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*Converse v. United States.*

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The repeal of the proviso left the right of officers of the customs to participate in the commissions for disbursing the appropriation made for the year ending June 31, 1849, to stand upon the law as elsewhere found; and restored to the Secretary of the Treasury the power to appoint persons other than collectors to make the disbursements; and if collectors should be appointed, it left their right to commissions to depend on the law as elsewhere found.

It must be admitted that this repeal might, under some circumstances, indicate an intention to have collectors participate in these commissions. If they have been for the first time deprived of them by the proviso, its repeal would quite clearly show that their former title was restored. But the contrary is true. Independent of the proviso, they had no title to this or any other extra compensation, and, by force of the act of August 2, 1842, could have none, unless explicitly granted by the act making the appropriation; so that unless I can say that the repeal of the proviso either repeals the second section of the act of 1842, or satisfies its requirements by an explicit appropriation to pay an extra compensation for an extra service, the defendant has no title to the commission. That the second section of the act of 1842 is not repealed by implication, by the repeal of the proviso, is clear. There is no repugnance between this repeal and the act of 1842. The reasons for repealing the entire proviso may have been that the act of 1842 was broad enough to cover the cases of extra compensation contemplated by the proviso, and so it was not necessary, in so far as its object was to provide for those cases; and in so far as it required the service to be performed by collectors only, that it was inexpedient. But to amount to a compliance with the second section of the act of 1842, it should have superadded to the repeal of the proviso, an explicit declaration that the appropriation was intended as extra compensation to those officers, having fixed salaries, who might be selected to render the service.

There are two other views of this subject, either of which would, in my judgment, be sufficient to show that there is no lawful claim to these commissions.

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*Cannons v. United States.*

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The first is, that although Mr. Greely was superintendent of lights within a certain district, extending round the Massachusetts Bay, yet these commissions are charged on disbursements made by him in the purchase, under the orders of the Secretary of the Treasury, of oil and some other materials for the whole light-house service of the United States. Now, the appropriation made is for "superintendents' commissions." If he did not render this service as superintendent, but, aside from that employment, acted under the orders of the Secretary of the Treasury in making large purchases for this service, no appropriation is made for paying him. It was, no doubt, an onerous and responsible duty, imposed upon him because he happened to be at a place favorable for making these purchases; and this may constitute a claim on the equitable consideration of Congress, especially if the imposition of this onerous duty on him, instead of distributing it among all or most of the superintendents of lights, was advantageous to the Government. But this is for the consideration of Congress. It does not enable me to say an appropriation to pay commissions by way of extra compensation was actually made.

Besides, if the repeal of the proviso in the act of 1848 were held to amount to an explicit declaration that collectors might participate in the commissions of superintendents, by way of extra compensation, the inquiry would still remain, To what extent may they receive such extra compensation? And this seems to me to be answered by the act of May 7, 1822, sec. 18, (8 Stat. at L., 696,) "That no collector, surveyor, or naval officer, shall ever receive more than four hundred dollars annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States in any other office or capacity." In the case of *Hoyt v. United States*, (10 How., 141,) the Supreme Court considered this section in force, and applied it to the case of a collector who held office from March, 1838, to March, 1841, and I am not aware of its having been since repealed. It was admitted that, aside from the charge now in question, Mr. Greely had received extra compensation to the extent of four hundred dollars annually, for

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*Fenn v. Holme.*

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services performed for the United States in a capacity other than that of collector. It follows, that for services performed in making these contracts and disbursements, which were not within his duties as collector, he can make no further charge.

What has thus far been said relates exclusively to the defendant's claims under the act of 1849. The subsequent acts are so much more unfavorable to these claims, that I do not deem it necessary to enter into a particular discussion of them. They are the acts of September 30, 1850, (9 Stat. at L., 533,) March 3, 1851, (9 Stat. at L., 608,) and August 31, 1852, (10 Stat. at L., 86.) I have examined these acts, and am satisfied each of them deprives *every* collector, whose compensation exceeds twenty-five hundred dollars, of all participation in these commissions, though they are required to render the service of superintendents of lights or disbursing agents in procuring supplies for them.

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WILLIAM FENN, PLAINTIFF IN ERROR, *v.* PETER H. HOLME.

The plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and evidence of an equitable title will not be sufficient for a recovery.

Hence, the holder of a New Madrid certificate, upon which no patent had been issued, and whilst it was yet uncertain whether or not the proposed location of it was reserved under older surveys, could not recover in ejectment. The legal title was in the Government.

The cases referred to, showing the necessity of preserving the distinction between legal and equitable rights and remedies.

The practice of allowing ejectments to be maintained in State courts upon equitable titles cannot affect the jurisdiction of the courts of the United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Missouri.

The case is explained in the opinion of the court.

It was argued by *Mr. Gibson* and *Mr. Gamble* for the plaintiff in error, and by *Mr. Leonard* for the defendant; but the

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*Penn v. Holme.*

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point upon which the decision of this court turned did not attract the attention of the counsel.

Mr. Justice DANIEL delivered the opinion of the court.

The defendant in error, as a citizen of the State of Illinois, instituted an action of ejectment against the plaintiff in the court above mentioned, and obtained a verdict and judgment against him for a tract of land, described in the declaration as a tract of land situated in St. Louis county, being the same tract of land known as United States survey No. 2,489, and located by virtue of a New Madrid certificate No. 105, and containing six hundred and forty acres.

Both the plaintiff and defendant in the Circuit Court trace the origin of their titles to the settlement claim of one James Y. O'Carroll, who, it is stated, obtained permission as early as the 6th of September, 1803, from the Spanish authorities, to settle on the vacant lands in Upper Louisiana, and who, in virtue of that permission, and on proof by one Ruddell of actual inhabitancy and cultivation prior to the 20th of December, 1803, claimed the quantity of one thousand arpens of land near the Mississippi, in the district of New Madrid. Upon this application, the land commissioners, on the 13th of March, 1806, made a decision by which they granted to the claimant one thousand arpens of land, situated as aforesaid, provided so much be found vacant there.

On the 14th of December, 1810, the commissioners, acting again on the claim of O'Carroll for one thousand arpens, declare that the board grant to James Y. O'Carroll three hundred and fifty acres of land, and order that the same be surveyed as nearly in a square as may be, so as to include his improvements. The claim thus allowed by the commissioners was, by the operation of the 4th section of the act of Congress approved March 3, 1813, enlarged and extended to the quantity of six hundred and forty acres. (Vide Stat. at Large, p. 813, vol. 2.)

In the year 1812, a portion of the lands in the county of New Madrid having been injured by earthquakes, Congress, by an act approved on the 17th of February, 1815, provided that

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*Fenn v. Holme.*

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"any person or persons owning lands in the county of New Madrid, in the Missouri Territory, with the extent the said county had on the 10th day of November, 1812, and whose lands have been materially injured by earthquakes, shall be and they hereby are authorized to locate the like quantity of land on any of the public lands of the said Territory, the sale of which is authorized by law." (Stat. at L., vol. 3, p. 211.)

On the 30th of November, 1815, the recorder of land titles for Missouri, upon evidence produced to him that the six hundred and forty acre grant to James Y. O'Carroll had been materially injured by earthquakes, in virtue of the act of Congress of 1815, granted to said O'Carroll New Madrid certificate No. 105, by which the grantee was authorized to locate six hundred and forty acres of land on any of the public lands in the Territory of Missouri, the sale of which was authorized by law. Upon the conflicting claims asserted under this New Madrid certificate, and upon the ascertainment of the locations attempted in virtue of its authority, this controversy has arisen.

Each party to this controversy professes to deduce title from the settlement right of O'Carroll, through mesne conveyances proceeding from him. With respect to the construction of these conveyances, several prayers have been presented by both plaintiff and defendant, and opinions as to their effect have been expressed by the Circuit Court; but as to the rights really conferred, or intended to be conferred, by these transactions, it would, according to the view of this cause taken by this court, be not merely useless, but premature and irregular to discuss, and much more so to undertake to determine them.

This is an attempt to assert at law, and by a legal remedy, a right to real property—an action of ejectment to establish the right of possession in land.

That the plaintiff in ejectment must in all cases prove a *legal* title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an *equitable* estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them. Such authority may,

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*Fenn v. Holme.*

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however, be seen in the cases of *Goodtitle v. Jones*, 7 T. R., 49; of *Doe v. Wroot*, 5 East., 132; and of *Roe v. Head*, 8 T. R., 118. This legal title the plaintiff must establish either upon a connected documentary chain of evidence, or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title.

By the Constitution of the United States, and by the acts of Congress organizing the Federal courts, and defining and in vesting the jurisdiction of these tribunals, the distinction between common-law and equity jurisdiction has been explicitly declared and carefully defined and established. Thus, in section 2, article 3, of the Constitution, it is declared that "the judicial power of the United States shall extend to all cases in *law* and *equity* arising under this Constitution, the laws of the United States," &c.

In the act of Congress "to establish the judicial courts of the United States," this distribution of law and equity powers is frequently referred to; and by the 16th section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided "that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the Court or Chancery in England.

In the case of *Robinson v. Campbell*, 8 Wheat., on page 221, this court have said: "By the laws of the United States, the Circuit Courts have cognizance of all suits of a civil nature at common law and in equity, in cases which fall within the lim

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*Fenn v. Holmes.*

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its prescribed by those laws. By the 24th section of the judiciary act of 1789 it is provided, that the laws of the several States, except where the Constitution, treaties, or statutes of the United States, shall otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. The act of May, 1792, confirms the modes of proceeding then used at common law in the courts of the United States, and declares that the modes of proceeding in suits in equity shall be according to the principles, rules, and usages, which belong to courts of equity, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of Congress by these provisions to confine the courts of the United States, in their mode of administering relief, to the same remedies, and those only, with all their incidents, which existed in the courts of the respective States; in other words, whether it was their intention to give the party relief *at law*, where the practice of the State courts would give it, and *relief in equity only* when, according to such practice, a plain, adequate, and complete remedy could not be had at law? In some States in the Union, no court of chancery exists to administer equitable relief. In some of those States, courts of law recognise and enforce in suits at law all equitable rights and claims which a court of equity would recognise and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the State practice in all its extent, would at once extinguish in such States the exercise of equitable jurisdiction. The acts of Congress have distinguished between remedies at common law and equity, yet this construction would confound them. The court therefore think, that to effectuate the purposes of the Legislature, the remedies in the courts of the United States are to be at common law or in equity—not according to the practice in the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.”

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*Penn v. Holme.*

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In the case of *Parsons v. Bedford et al.*, 8 Peters, on pp. 446, 447, this court, in speaking of the seventh amendment of the Constitution, and of the state of public sentiment which demanded and produced that amendment, say :

“The Constitution had declared, in the 3d article, that the judicial power shall extend to all cases *in law and equity* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that the distinction was present in the minds of the framers of the amendment. By *common law*, they meant what the Constitution denominated in the 3d article *LAW*, not merely *suits* which the common law recognised among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where *equitable rights* alone were recognised and equitable remedies administered.”

The same doctrine is recognised in the case of *Strother v. Lucas*, in 6 Peters, pp. 768, 769 of the volume, and in the case of *Parish v. Ellis*, 16 Peters, pp. 453, 454. So, too, as late as the year 1850, in the case of *Bennett v. Butterworth*, reported in the 11th of Howard, 669, the Chief Justice thus states the law as applicable to the question before us :

“The common law has been adopted in Texas, but the forms and rules of pleading in common-law cases have been abolished, and the parties are at liberty to set out their respective claims and defences in any form that will bring them before the court; and, as there is no distinction in its courts between cases at law and in equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or a bill in equity. Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States; and, although the forms of proceedings



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*Fenn v. Holme.*

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and practice in the State courts have been adopted in the District Court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States."

The authorities above cited are deemed decisive against the right of the plaintiff in the court below to a recovery upon the facts disclosed in this record, which show that the action in that court was instituted upon an equitable and not upon a legal title. With the attempt to locate O'Carroll's New Madrid warrant No. 150, in addition to its interference with what was called the *St. Louis common*, there were opposed five conflicting surveys. In consequence of this state of facts, the Commissioner of the General Land Office, on the 19th of March, 1847, addressed to the surveyor general of Missouri the following instructions: "If, on examination, it should satisfactorily appear to you that the lands embraced by said surveys were at the date of O'Carroll's location reserved for said claims, the O'Carroll location must yield to them, because such land is interdicted under the New Madrid act of the 17th of February, 1815; but if, at the time of location, either of the tracts was not reserved, but was such land as was authorized by the New Madrid act to be located, the New Madrid claim No. 105 will of course hold valid against either tract in this category. The fact on this point can be best determined by the surveyor general from the records of his office, aided by those of the recorder. If there be no valid claim to any portion of *the residue* of the O'Carroll claim, and such residue was such land as was allowed by the New Madrid act of 17th of February, 1815, to be located, on the return here of a proper

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*Fenn v. Holma.*

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plat and patent certificate for said residue, a patent will issue."

At this point the entire action of the land department of the Government terminated. No act is shown by which the extent of the St. Louis common, said to be paramount, was ascertained; no information supplied with respect to the validity or extent of the conflicting surveys, as called for by the Commissioner; no plat or patent certificate, either for the whole of the warrant or for any residue to be claimed thereupon, ever returned to the General Land Office, and no patent issued. The plaintiff in the Circuit Court founded his claim exclusively and solely upon the New Madrid warrant.

The inquiry then presents itself, as to who holds the *legal* title to the land in question. The answer to this question is, that the title remains in the original owner, the Government, until it is invested by the Government in its grantee. This results from the nature of the case, and is the rule affirmed by this court in the case of *Bagnall et al. v. Broderick*, in which it is declared, "that Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Government in reference to the public lands declares the patent to be the superior and conclusive evidence of the *legal title*. Until it issues, the fee is in the Government, which by the patent passes to the grantee, and he is entitled to enforce the possession in ejectment. (13 Peters, p. 436.)

A practice has prevailed in some of the States (and amongst them the State of Missouri) of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their character; but this practice, as was so explicitly ruled in the case of *Bennett v. Butterworth*, (11 How.,) can in no wise affect the jurisdiction of the courts of the United States, who, both by the Constitution and by the acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decision appropriate to each.

The judgment of the Circuit Court is to be reversed with costs.

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*Clearwater v. Meredith et al.*

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**HIRAM CLEARWATER, PLAINTIFF IN ERROR, v. SOLOMON MEREDITH, PLEASANT JOHNSON, AND THOMAS TYNER.**

Where four persons made a contract with a citizen of Ohio, and three of the four were citizens of Indiana, and suit was brought against the three in the Circuit Court of the United States for Indiana, the non-joinder of the fourth was justified by the act of 1839, (5 Stat. at L., 321.)

The decision at the present term, in the case of *Hill v. Smith*, again affirmed.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Indiana.

On the 18th of March, 1857, Hiram Clearwater, a citizen of Ohio, brought a suit against Johnson, Meredith, and Tyner, citizens of Indiana; and in the declaration said, that the "defendants, together with one Caleb B. Smith, who, at the time of the commencement of this suit, was not a citizen of the State of Indiana, and is therefore not joined as a defendant herein, made and delivered to the plaintiff their certain written agreement," &c., &c.

The cause of action was a written agreement, signed by the four persons above named, guarantying that the stock in a railroad company should be at par within a certain time, in consideration that Clearwater had executed a deed of conveyance of land to Meredith, (to whom the same had been sold by the company,) Clearwater having previously contracted to sell it to the company.

The three defendants named in the caption appeared and filed the following demurrer:

"The said defendants, by counsel, come and say the declaration of the said plaintiff, and the several counts therein contained, are severally insufficient in law to enable said plaintiff to have and maintain his action against said defendants, and for cause of demurrer shows to the court the following:

"1 The jurisdiction of the court is not shown by proper averment.

"2. No sufficient consideration is shown for the undertaking.

"3. The several counts do not contain facts sufficient to constitute a cause of action."

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*Clearwater v. Meredith et al.*

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This demurrer was sustained by the court below, and a writ of error brought this ruling before this court.

It was argued by *Mr. Pugh* for the plaintiff in error, and *Mr Thompson* for the defendants.

With respect to the first ground of demurrer, *Mr. Pugh* contended that the non-joinder of Smith was excused by the first section of the act approved February 28, 1889, (5 Stat. at L., 321, 322; 14 Peters, 60;) and, moreover, the omission should have been pleaded in abatement. It was not a ground of demurrer. With respect to the other two grounds, the conveyance of the land to Meredith was a sufficient consideration for the promise of the defendants.

*Mr. Thompson* contended that the omission was fatal, inasmuch as the declaration does not show a case of which the Circuit Court had jurisdiction. The rule is this: that when there are two or more plaintiffs or defendants, each of the plaintiffs must be capable of suing, and each of the defendants of being sued, in order to support the jurisdiction. *Bank of Vicksburg v. Slocomb et al.*, (14 Pet., 64,) where this interpretation is given to the act of February 28, 1889. (5 U. S. Stat., 321.) The declaration here should show that Smith is a citizen of a different State from the plaintiff; for, in the Federal courts, jurisdiction must be shown. If it is not shown, the objection is fatal, at any stage of the case. It needs no plea. And this is the ground, evidently, upon which the demurrer was sustained below.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Indiana.

The plaintiff, who is averred to be a citizen of the State of Ohio, brought his action against Solomon Meredith and Thomas Tyner, citizens of Indiana, on the 12th July, 1853, together with Caleb B. Smith, who, at the time of the commencement of this suit, was not a citizen of the State of Indiana, and is therefore not joined as a defendant herein, &c.

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*Clearwater v. Meredith et al.*

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The declaration has three counts, one of which contains the following guaranty:

"Whereas Hiram Clearwater, of the city of Cincinnati, on the 6th of May, 1853, contracted with the Cincinnati, Cambridge, and Chicago Short Line Railway Company for the sale of a tract of land situate in Wayne county, Indiana, lying on the national road, about four miles east of Cambridge city, and adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the consideration of ten thousand dollars, to be paid in the capital stock of said company at par; and whereas, in such contract of sale, it was agreed that said company should furnish to said Clearwater a guaranty that the capital stock of said railway company should be at par within one year from the completion of the entire line of said road: Now, in consideration that the said H. Clearwater has, with the consent of the said company, and at our request, executed a deed of conveyance to Solomon Meredith for said land, to whom the same has been sold by the said company, we, the undersigned, hereby guaranty that the said stock of said company, which has been issued to said Clearwater in pursuance of said contract, shall be worth par in the city of Cincinnati within one year from the time the said railroad shall be completed from Cincinnati to Newcastle, Indiana, and that said road shall be completed within two years from the 1st day of October, 1853, and signed by Pleasant Johnson, S. Meredith, Caleb B. Smith, and Thomas Tyner."

The defendants, by counsel, come and say the declaration of the said plaintiff, and the counts therein contained, are severally insufficient in law to enable said plaintiff to have and maintain his action against said defendants; and for cause of demurrer shows to the court the following:

1. The jurisdiction of the court is not shown by proper averment.

2. No consideration is shown for the undertaking.

3. The several counts do not contain facts sufficient to constitute a cause of action; wherefore the defendants pray judgment, &c.

If this be regarded as a plea to the jurisdiction of the court,

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*Clearwater v. Meredith et al.*

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it is argued that the suit is brought on a joint contract executed by the defendants in error, when only two of them were served with process, and the third one, Caleb B. Smith, who, at the time of the commencement of the suit, was not a citizen of the State of Indiana, and is therefore not joined as a defendant herein, &c.

The first section of the act of February 28th, 1839, provides that "where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer."

In the case of the Railroad Bank of Vicksburg *v.* Slocomb et al., (14 Peters, 65,) it is said the 11th section of the judiciary act declares that no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

It has been held that this is a personal privilege of not being sued out of the district in which the defendant may live, or in which he shall be found on serving the writ, and that it may be waived by the defendant. And it is said, in the above opinion, "that it did not contemplate a change in the jurisdiction of the courts, as it regards the character of the parties, as prescribed by the judiciary act, and expounded by this court—that is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued; which is not the case in this suit, some of the defendants being citizens of the same State with the plaintiffs."

It is well known that the act of 1839 was intended so to modify the jurisdiction of the Circuit Court as to make it more practical and effective. Where one or more of the defendants

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*Lea v. Polk County Copper Company.*

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sued were citizens of the State, and were jointly bound with those who were citizens of other States, and who did not voluntarily appear, the plaintiff had a right to prosecute his suit to judgment against those who were served with process; but such judgment or decree shall not prejudice other parties not served with process, or who do not voluntarily appear.

Now, it is too clear for controversy, that the act of 1839 did intend to change the character of the parties to the suit. The plaintiff may sue in the Circuit Court any part of the defendants, although others may be jointly bound by the contract who are citizens of other States. The defendants who are citizens of other States are not prejudiced by this procedure, but those on whom process has been served, and who are made amenable to the jurisdiction of the court.

And in regard to those whose rights are in no respect affected by the judgment or decree, it can be of no importance of what States they are citizens. If one of the defendants should be a citizen of the same State with the plaintiff, no jurisdiction could be exercised as between them, and no prejudice to the rights of either could be done.

The plea to the jurisdiction seems not to be well taken, and it cannot be sustained.

In the case of *Hill v. Smith and others*, decided at the present term, this court held that the demurrer filed to the counts on the guaranty did not bring up the validity of that instrument for the action of the court, and that it must be specially pleaded, with suitable averments. And the court reversed the judgment, and remanded it to the Circuit Court, with leave, on the payment of costs, to move to amend the pleadings, so as to raise the questions on the guaranty. The same order is made in the present case.

Judgment reversed.

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WILLIAM P. LEA, APPELLANT, v. THE POLK COUNTY COPPER  
COMPANY ET AL.

The certificate of probate of a deed in Tennessee did not say that the witness swore that the grantor acknowledged it on the day of its date. But as the cer

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*Lea v. Polk County Copper Company.*

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tificate said that the grantor acknowledged it for the purposes therein contained, the probate is covered by an act passed in 1846.

Where a grant conveyed the legal title in 1842, and innocent purchasers paid for the property, and took legal conveyances for it, with an honest belief that they were dealing for and acquiring a legal title from the true owner, a claimant of the equity of the patent cannot set it up to overthrow the purchase.

There was nothing in the case to cause suspicion in the minds of these purchasers.

Three letters were added in the patent to the original name of the patentee. But the register did this in the course of his official duty, and, as this court believe, honestly; if the purchasers had gone into the inquiry, the presumption would have been that the register did his duty.

These innocent purchasers might properly buy up an outstanding title.

Where a person was in possession, this was sufficient notice to a claimant of an adverse title; and whether the deed under which this person claimed was registered or not, was of no importance to the claimant.

The act of limitations of the State of Tennessee protects persons in possession of land under the following circumstances :

1. They must have had seven years' possession of land granted by the State.
2. They must have held or claimed the land by virtue of a deed of conveyance, or other assurance, purporting to convey an estate in fee simple.
3. No claim by suit in law or equity, effectually prosecuted, should have been set up, or made to said lands, within that time.

Under the second head, an unregistered deed is sufficient to constitute the bar.

The deed, when recorded, related back to its date.

The possession of several persons in succession, claiming under the same title, was the same possession; and the evidence shows that the persons claiming under the statute were in possession for the required period of time.

Courts of justice lend a very unwilling ear to statements of what dead men have said.

The allegation that the possession was fraudulent, under a fraudulent grant and fraudulent deed, is not sustained by the evidence. Whether the deed which purported to convey an estate in fee simple was void or not, is immaterial, as the act of limitation intended to protect possession held under such deeds. The adverse possession was notice to everybody of the existence of the claim.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Tennessee.

It was a bill filed by Lea for the purposes stated in the opinion of the court, where the facts of the case are also given.

It was argued by *Mr. Campbell* and *Mr. Stanton* for the appellant, and by *Mr. Smith* and *Mr. Lyon* for the appellees, on which side there was also a brief by *Mr. Maynard*



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*Lea v. Polk County Copper Company.*

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The points made by the counsel are noticed and commented on in the opinion of the court.

Mr. Justice CATRON delivered the opinion of the court.

There stood on the record book an entry for 80 acres, in the name of William P. Lea, No. 5,446, dated April 5, 1842.

A patent issued, founded on this entry, dated 21st August, 1842, No. 5,744.

This patent is in the name of William Park Lea. It was signed by the Governor, countersigned by the Secretary of State, and sealed with the great seal of the State.

As originally filled up, it was in the name of William P. Lea, and was altered to William Park Lea, by adding the letters "ark" to the P. This was done by the register of the land office, whose duty it was to prepare the patent for the signatures of the Governor and Secretary; and the act of affixing the great seal to it, which gave it validity as against the State, divested her title, and vested it in the grantee, on the patent thus executed being delivered to him.

William Park Lea and William Pinkney Lea wrote their names alike, William P. Lea; the latter always, and the former frequently, although he often signed his name William Park Lea. The register added the letters "ark" to the middle name, to distinguish between them, as both had entered lands in the entry taker's office, and confusion prevailed as to who was the proper owner. This is the effect of the register's evidence. In filling up grants Nos. 6,260, 6,258, and 5,764, they were made out in the name of William Park Lea; but the register scraped out the letters "ark," and issued the patents in the name of William P. Lea, because the lands had been entered by William Pinkney Lea.

No. 5,764 of these patents was filled up on the same day (21st August, 1842) that the one (No. 5,744) here in dispute was filled up, and the letters "ark" added to the letter P; the other two (Nos. 6,260 and 6,258) were filled up December 8th, 1842. Five other patents were filled up properly in the name of William P. Lea. This was all done in the latter six months of 1842, and the grants were founded on entries made

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*Lea v. Polk County Copper Company.*

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in April of that year, in the Ocoee land office. The respective claimants were related to each other, and familiarly known to the register. The entries had all been made and were recorded in the name, "William P. Lea."

That this was honestly done by the register, is not open to dispute. He has given a deposition in great detail, and accounts for his course of proceeding entirely to our satisfaction, so far as his integrity is concerned.

This patent (No. 5,744) the bill seeks to have reformed so as to stand in the name of William P. Lea, the complainant, and to be used in an action of ejectment pending in the court below, by the complainant, against the respondents; and, secondly, if said grant shall be found to have been issued to the person not entitled to the land, that then the court will divest the title of the respondents, and vest it in the complainant, so that he may use the decree on the trial of his action of ejectment.

3. The bill also prays, that the court may remove impending clouds from the complainant's title by declaring all the alleged titles of the respondents, or either of them, void, and direct the possession of said lands to be surrendered to the complainant, together with a prayer for further and general relief.

To the relief sought, among other defences, (set up in their answers,) the respondents rely on the fact that they claim under one John Davis, who purchased from William Park Lea, and took title by a deed in fee with a general warranty of title for the land in dispute, and that Davis, their vendor, purchased and paid for the land to said William Park Lea, without any notice or knowledge that the complainant had any equity in the land, or set up claim thereto.

This deed is produced, dated June 18th, 1846, and appears to have been duly executed by William Park Lea, and the consideration money was paid to him by John Davis. It is not pretended that John Davis had any notice of the complainant's claim when the deed was executed; the complainant had then no knowledge himself that he had any interest in the land.

One objection to this deed is, that it was not duly proved, and could not be lawfully registered according to the laws of

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*Lea v. Polk County Copper Company.*

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Tennessee. In the certificate of probate of Elias Davis, one of the subscribing witnesses, the clerk does not say the witness swore that the grantor acknowledged the same on the day it bears date. The other witness so proves. Now, as the deed shows the date, and the certificate of probate says the grantor acknowledged it for the purposes therein contained, the probate is covered by the provisions of the act of 1846, (ch. 78, Nicholson's Statute Laws, 242.)

Caldwell, Keith, & Mastin, purchased from John Davis in the year 1852, paid the purchase-money, (\$6,000,) and took a deed in fee simple, with a covenant of general warranty of title for the land in dispute; and they also rely on the plea that they were *bona fide* purchasers of the legal title, or what purported to be so; and this allegation is established by the proof, unless it be true that the letters "*ark*," crowded after the letter P, in William Park Lea's name, at the various places that this alteration is found in the patent, was sufficient to put the purchasers on inquiry. Now, if they had inquired of the register, he could only have told them that he put the letters there in the course of his official duty; but when, he could not say, this being what he proves here. Then the presumption comes in, that, as a public officer, the register did his duty, and he who impeaches the act as illegal must prove the allegation. On this assumption, the register filled up the patent as it is now found, before the Governor signed it, and the seal of State was attached—that is to say, when the patent bears date.

Then, again, all the incipient steps authorizing the register to issue the grant, the Governor to sign it, and the Secretary to attach the great seal, are presumed as having been regular; nor was the purchaser required to look behind the patent. (*Bagnell v. Broderick*, 13 Peters, 448.)

The bill of necessity admits that the *legal* title was vested in William Park Lea by the grant as it now stands; as, on any other assumption, the complainant would have his remedy at law, and must be turned out of court. The title has thus stood since 1842; important rights have grown up under it, with which a court of equity cannot interfere, on general principles of justice. (1 Story's Com. on Equity, sec. 64, c. 64, d.)

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*Lea v. Polk County Copper Company.*

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We mean to say, that if the equity conferred by the entry was in William Pinkney Lea, and the patent issued in the name of William Park Lea, and the Mining Company, or those under whom they claim, have innocently and ignorantly purchased and paid for the property, and took legal conveyances for it, with an honest belief that they were dealing for and acquiring a legal title from the true owner, then the complainant cannot be heard to set up his equity behind the grant to overthrow the purchase. (1 Story's Equ., 454.) And so the respondents, the Mining Company, might buy in the legal title of William Park Lea *after* they had notice, if they were innocent purchasers, holding under John Davis, and Mastin, Keith, & Caldwell. (1 Story Equ., s. 411.)

But it is insisted that the deed from Lea to Davis was not registered, and fraudulently concealed from the complainant, so that he could not proceed to assert his rights. Davis had possession of the land when he took William Park Lea's deed, claiming for himself, and adversely to all others; and he so continued in possession till he sold the land in December, 1852. This adverse possession was in itself notice that he held the land under a title, the character of which the complainant was bound to ascertain. (*Landis v. Brant*, 10 How., 375.)

Furthermore, Caldwell, Keith, & Mastin, purchased from Davis in December, 1852; they caused the deed from William Park Lea to Davis, and the one from the latter to them, to be duly registered, without having any knowledge of the complainant's claim, and without the existence of any circumstance to put them on inquiry respecting it. They were clearly *bona fide* purchasers of a legal title, that the complainant cannot assail in equity.

2. The respondents rely on the act of limitations of the State of Tennessee as a protection to their title and possession. The act declares "that where any person shall have had seven years' possession of any lands which have been granted by this State, holding or claiming the same by virtue of a deed of conveyance or other assurance, purporting to convey an estate in fee simple, and no claim by suit in law or equity, effectua-

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*Lea v. Polk County Copper Company.*

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ally prosecuted, shall have been set up or made to said lands within the aforesaid time, then, and in that case, the person or persons, their heirs or assigns, so holding possession, shall be entitled to keep and hold possession of such quantity of land as shall be specified and described in his deed, &c., in preference to, and against all, and all manner of person or persons whatever."

By the settled construction of the foregoing act, an unregistered deed is a sufficient title on which the bar can be founded; and when John Davis's deed from William Park Lea was recorded, it related to its date, and was good to draw the better title to it by force of the statute.

The possessions of John Davis, and Caldwell, Keith, & Martin, made one possession; and if the two were continuous for the whole term of seven years, then the bar was formed, and the defence complete. This brings us to the *fact* of actual possession held by Davis, for after he sold to Caldwell, Keith, & Martin, no one disputes their actual possession.

Davis purchased the improvements on the land from Wallace, 25th February, 1842, for the sum of forty dollars; and by the agreement, Wallace was to hold under Davis and occupy the premises for three years, which Wallace proves he did. He then left the place, and Wilson Abercrombie went into possession under Davis, and occupied the cabin one year. It being in the midst of a small field which was annually cultivated in grain crops, Davis removed the cabin beyond the field, and put it up again on the forty-acre lot, and Abercrombie occupied it another year. He was succeeded by Bailey McCoy as tenant of the cabin under Davis; McCoy occupied it for a year or more. Wallace's field could not have included more than some three acres, and had an orchard of peach trees on it. After the cabin was removed, Davis enlarged the field, and extended it across the southern line of the forty-acre lot, and also enlarged it, from time to time, by small clearings at the other end, (which were made for turnip patches,) until the field included about twelve acres, and which was annually cultivated by Davis, whose residence was within a few hundred yards of the field, on the adjoining section of land. This field

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*Lea v. Polk County Copper Company.*

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was obviously an important part of his plantation. That portion of the twelve-acre field lying on the forty-acre lot embraced, when this suit was brought, about five acres. Mann, the county surveyor, who run the lines of the forty-acre lot, in September, 1855, so states. He proves that the debris and ground plan of the cabin Wallace built and occupied were quite apparent; that the peach trees were there, and that the old and worn land was plainly distinguishable from that more recently cleared up, and which was on its different sides.

To overcome the evidence of continued possession on the part of Davis, two witnesses were produced by the complainant, to wit: Crawford Braswell and Jesse Shubird. The former swears that he resided in Ducktown from June, 1845, to October, 1850; that he knew John Davis, and the place Wallace improved. "I at one time (says he) purposed purchasing that eighty acres where the Wallace improvement was. Davis told me that he had only the occupant of Luther Wallace; that he did not own the land, and that he had moved the improvements off to another place; and, having asked him who owned the land, he stated it was entered by a man by the name of Lea. He stated he had moved off the house and fruit trees, and I think he also named the time." Says he thinks the conversation took place in July, 1848.

In answer to another question, the witness says: "Mr. Davis showed me where he had moved the house from, and I understood he had moved all the improvements off that place, and the stock was running on the land that had been enclosed, and, if any of the fencing was left, I did not notice it. The place was grown up very much with bushes. There might have been some rotten rails scattered where the fence was put, lying among the bushes and saplings."

This is represented, also, as having taken place in July, 1848; and the witness swears that, in the succeeding August, Davis showed him where the Wallace house had stood. He was interrogated, on the part of the complainant, as follows:

Please state whether or not you afterwards heard John Davis set up claim to the Wallace eighty-acre tract; and if so, state when it was, and fully what he said to you on the subject.

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*Lea v. Polk County Copper Company.*

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*Answer.* In the winter of 1849, there was a man there from Bradley county, looking at Davis's land, and talking of buying him out. I happened at Davis's at the time, and he requested me not to mention the conversation to any person, that had passed between us, about the land; that if he sold his land to that man, he should sell the Wallace place also.

*Question by same.* Please state whether that was the first time you heard him assume to own the eighty-acre Wallace tract.

*Answer.* He did not profess to own it then, but said he should sell it with the balance, if he sold at all.

*Interrogatory by same.* State whether or not John Davis had the Luther Wallace place enclosed at any time; and if so, state when he had it done.

*Answer.* If he had it enclosed at any time, it was since I left that country.

To the cross-interrogatories, the witness stated:

Do you say there was no land on the Wallace tract enclosed and in cultivation during the years 1848, 1849, and 1850?

*Answer.* None in 1848, and none afterwards that I know of.

Are you acquainted with the boundaries of the Wallace land, and can you say, positively, that there was no land on said tract in cultivation during the aforesaid years?

*Answer.* I was not acquainted with the lines of the tract, and, if there was any in cultivation on the tract, I did not know it.

Can you, then, say positively that no part of the field, about where the old Wallace house stood, was in cultivation during the time mentioned?

*Answer.* No part of it was in cultivation during the time I lived there.

In your answer to complainant's sixth question, you say he (John Davis) stated that Lea had entered the land. State where that conversation took place, when; and if any person was present, give the name or names.

*Answer.* This conversation took place at Davis's mill, in the month of July, 1848, and there was no person present.

In your answer to complainant's third question, you say that John Davis told you he had only the occupant right, which he

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*Lea v. Polk County Copper Company.*

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had purchased from Wallace, and that he did not own the land; state exactly what he told you, and at what time.

*Answer.* In the month of July, 1848, he made the statements I have made in that answer, that he had only bought the improvements from Wallace, and that he did not own the land, and would not sell it, and make a title to it.

Shubird swears that he went to Ducktown to reside in 1848, and lived there about three years; says he knew John Davis, and the Luther Wallace improvement.

The succeeding questions propounded for the complainant, and the answers to them, will best present the material statements of this witness:

State whether or not the Luther Wallace improvement was moved from the place where he first put it up; and if so, state who had it moved, and where it was moved to.

*Answer.* The houses, fencing, and peach trees, were moved from the place they were first put on the Luther Wallace place. They were moved by John Davis, and put on his own land.

How far were these improvements taken from where Luther Wallace had put them up?

*Answer.* I can't exactly say, but suppose a half mile or three-quarters.

Please state why John Davis removed these improvements. Tell all you may have heard John Davis say on that subject.

*Answer.* He (John Davis) stated to me that the reason he moved them was, that he was afraid he would lose his labor, as he had understood a man by the name of Lea had entered the land, and stated that he did not own the land.

State whether or not you ever heard John Davis claim the land where the Luther Wallace improvement was, at any time while you lived with him.

*Answer.* The Luther Wallace place is now called Copper Hill. I think in about the year 1849, after the copper property came into notice, John Davis set up a claim, and said it.

Do you know whether or not the Luther Wallace improvement or property was left vacant and turned out at the time Davis removed the fencing, &c., away? And if so, state how long it was left vacant.



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*Lea v. Polk County Copper Company.*

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*Answer.* The property was left vacant—how long I can't say, but until Davis set up his claim; he then commenced fixing up the fencing again.

On cross-examination, the witness states that he went to Ducktown in March, 1848; that the Wallace house had been removed before; nor was there any enclosed land on the Copper Hill tract when he went there.

He is then further interrogated, and answers:

How can you say, then, as in your answer to complainant's third interrogatory, that the house, fencing, and peach trees, were removed by John Davis, and put upon his own land?

*Answer.* I heard John Davis say so.

At what time did Davis tell you this, and how did he happen to speak to you on this subject?

*Answer.* Shortly after I went there—I can't say exactly what time—John Davis and myself, after passing through his farm, passed upon the vacant place of Luther Wallace. He mentioned the subject himself, and told what I have heretofore stated.

On which side of Davis's mill creek was the improvement of which you have been speaking situated?

*Answer.* It was situated on the left hand when going up the creek.

Was there not, at that time, a small field enclosed between the mill creek and the Copper Hill?

*Answer.* Not to my knowledge, as I don't know whether there was or not, as I know nothing about it, only as Davis told me that he had taken all off.

Was there any person present when this conversation occurred between you and Davis? If so, state who it was.

*Answer.* There was no person present.

If the evidence of these two witnesses be true, then there was no continuous adverse holding; and the question is, whether it is entitled to credit? Braswell swears that the entire improvements were removed, including the fruit trees; and that the land where the Wallace improvement had been made was grown up and overrun with bushes and saplings; that this was the condition of the place in 1848. Shubird proves the same, with the exception that he says nothing as

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*Lea v. Polk County Copper Company.*

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respects the undergrowth. So far as conversations with John Davis are given, they may be dismissed, with the remark, that he had obtained William Park Lea's deed for the land in June, 1846, and was not at all likely to carefully disavow all title, and say the land belonged to one Lea.

In 1856, when these depositions were taken, John Davis was dead, and courts of justice lend a very unwilling ear to statements of what dead men had said.

Many witnesses have been examined to prove that Braswell and Shubird are not entitled to credit on oath as witnesses, and many prove the reverse. That they are men of no substantial worth, and of little respectability, is manifest enough, and confidence in their integrity is certainly impaired. But in this case, as in most others, the integrity of the witnesses is easily ascertained. If the land was grown up in bushes and saplings in 1848, it must have been thrown out as a waste place six or eight years before that time. Davis purchased Wallace's possession in February, 1842. Wallace remained there three years by agreement with Davis. Then Abercrombie came in, and occupied the house one year whilst it stood in the field. It was then removed beyond the field, and had no connection with it. Davis himself took possession of the cleared land, and cultivated it. It was rented by Davis to Dugger either in 1849 or 1850, and he raised a crop on it. The orchard was there then, and continued there till 1855, after this suit was brought, as Mann, the county surveyor, proves, who traced the lines of the Copper Hill tract, and examined the cleared land in the twelve-acre field, and especially that part north of the southern line of the forty-acre lot. Mann states that the marks of the old house built by Wallace were plainly visible, and so was the old worn land cleared by Wallace, and that the peach trees were there. Substantially the same facts are proved by nearly all of the witnesses examined on part of the respondents. It is the most familiar fact in the cause.

That the Wallace field and orchard were constantly under fence from the time Davis purchased of Wallace, and certainly never abandoned nor overrun with brushwood and saplings, is fully established.

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*Lea v. Polk County Copper Company.*

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And our opinion is, that when Braswell and Shubird deposed to the reverse, they stated what was untrue.

The complainant in his amended bill does not controvert the fact that adverse possession, for more than seven years, had been holden of the land in dispute, but relies on the following allegations to avoid the bar, to wit:

Your orator shows the defendants, in their answers on file, charge that the said John Davis and those claiming under him had seven years' peaceable, uninterrupted, adverse possession of the land in dispute, previously to the filing of the original bill, and previous to the suit at law; as to which facts no answer is asked herein from defendants; but if any such possession existed, your orator charges, and which charge your orator does require to be answered, that it was a fraudulent possession, under a fraudulent grant and fraudulent deed, the registration of which was postponed until within about the last two years; that the possession of your orator's grant, first by the said William Park Lea, and then by the said John Davis, was fraudulently concealed from him by them; that he never had any knowledge or information thereof until about the time stated in his original bill, and within the last twelve months; and that, as his cause of action was thus fraudulently concealed, the statute of limitations cannot apply.

These allegations are specially denied by the answer of the respondents, except as to the fact that the deed from William Park Lea to John Davis was not registered, which is admitted. Of the other allegations there is no proof, and of course they are not in the case.

Whether Lea had title or not at the time he conveyed to Davis is altogether immaterial, as the Tennessee act of limitation intended to protect and confirm void deeds purporting to convey an estate in fee simple, where seven years' adverse possession had been held under them. Nor was Davis bound to register his deed from Lea; between them, as grantor and grantee, it was valid without registration. Neither can the complainant be heard to say that he had no notice of the fact that Davis claimed title to the land. His possession and adverse holding was notice to the world, as will be seen by the case of *Landis v. Brant*, above cited.

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*Ableman v. Booth and United States v. Booth.*

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On the two grounds above stated, we order that the decrees of the Circuit Court dismissing the bill be affirmed.

Mr. Justice DANIEL dissenting:

In the case of *Lea v. The Coppermine Company*, it is my opinion that the company, as a corporation, could neither plead nor be impleaded in a court of the United States.

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STEPHEN V. R. ABLEMAN, PLAINTIFF IN ERROR, *v.* SHERMAN M. BOOTH; AND THE UNITED STATES, PLAINTIFF IN ERROR, *v.* SHERMAN M. BOOTH.

1. The process of a State court or judge has no authority beyond the limits of the sovereignty which confers the judicial power.
2. A *habeas corpus*, issued by a State judge or court, has no authority within the limits of the sovereignty assigned by the Constitution to the United States. The sovereignty of the United States and of a State are distinct and independent of each other within their respective spheres of action, although both exist and exercise their powers within the same territorial limits.
3. When a writ of *habeas corpus* is served on a marshal or other person having a prisoner in custody under the authority of the United States, it is his duty, by a proper return, to make known to the State judge or court the authority by which he holds him. But, at the same time, it is his duty not to obey the process of the State authority, but to obey and execute the process of the United States.
4. This court has appellate power in all cases arising under the Constitution and laws of the United States, with such exceptions and regulations as Congress may make, whether the cases arise in a State court or an inferior court of the United States. And, under the act of Congress of 1789, when the decision of the State court is against the right claimed under the Constitution or laws of the United States, a writ of error will lie to bring the judgment of the State court before this court for re-examination and revision.
5. The act of Congress of September 18, 1850, usually called the fugitive slave law, is constitutional in all its provisions.
6. The commissioner appointed by the District Court of the United States for the district of Wisconsin had authority to issue his warrant and commit the defendant in error for an offence against the act of September 18, 1850.
7. The District Court of the United States had exclusive jurisdiction to try and punish the offence; and the validity of its proceedings and judgment cannot be re-examined and set aside by any other tribunal.

THESE two cases were brought up from the Supreme Court

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*Ableman v. Booth and United States v. Booth.*

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of the State of Wisconsin by a writ of error issued under the 25th section of the judiciary act.

The facts are stated in the opinion of the court.

They were argued by *Mr. Black* (Attorney General) for the plaintiffs in error, no counsel appearing for the defendant.

Mr. Chief Justice TANEY delivered the opinion of the court.

The plaintiff in error in the first of these cases is the marshal of the United States for the district of Wisconsin, and the two cases have arisen out of the same transaction, and depend, to some extent, upon the same principles. On that account, they have been argued and considered together; and the following are the facts as they appear in the transcripts before us :

Sherman M. Booth was charged before Winfield Smith, a commissioner duly appointed by the District Court of the United States for the district of Wisconsin, with having, on the 11th day of March, 1854, aided and abetted, at Milwaukee, in the said district, the escape of a fugitive slave from the deputy marshal, who had him in custody under a warrant issued by the district judge of the United States for that district, under the act of Congress of September 18, 1850.

Upon the examination before the commissioner, he was satisfied that an offence had been committed as charged, and that there was probable cause to believe that Booth had been guilty of it; and thereupon held him to bail to appear and answer before the District Court of the United States for the district of Wisconsin, on the first Monday in July then next ensuing. But on the 26th of May his bail or surety in the recognisance delivered him to the marshal, in the presence of the commissioner, and requested the commissioner to recommit Booth to the custody of the marshal; and he having failed to recognise again for his appearance before the District Court, the commissioner committed him to the custody of the marshal, to be delivered to the keeper of the jail until he should be discharged by due course of law.

Booth made application on the next day, the 27th of May,

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*Ableman v. Booth and United States v. Booth.*

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to A. D. Smith, one of the justices of the Supreme Court of the State of Wisconsin, for a writ of *habeas corpus*, stating that he was restrained of his liberty by Stephen V. R. Ableman, marshal of the United States for that district, under the warrant of commitment hereinbefore mentioned; and alleging that his imprisonment was illegal, because the act of Congress of September 18, 1850, was unconstitutional and void; and also that the warrant was defective, and did not describe the offence created by that act, even if the act were valid.

Upon this application, the justice, on the same day, issued the writ of *habeas corpus*, directed to the marshal, requiring him forthwith to have the body of Booth before him, (the said justice,) together with the time and cause of his imprisonment. The marshal thereupon, on the day above mentioned, produced Booth, and made his return, stating that he was received into his custody as marshal on the day before, and held in custody by virtue of the warrant of the commissioner above mentioned, a copy of which he annexed to and returned with the writ.

To this return Booth demurred, as not sufficient in law to justify his detention. And upon the hearing the justice decided that his detention was illegal, and ordered the marshal to discharge him and set him at liberty, which was accordingly done.

Afterwards, on the 9th of June, in the same year, the marshal applied to the Supreme Court of the State for a *certiorari*, setting forth in his application the proceedings hereinbefore mentioned, and charging that the release of Booth by the justice was erroneous and unlawful, and praying that his proceedings might be brought before the Supreme Court of the State for revision.

The *certiorari* was allowed on the same day; and the writ was accordingly issued on the 12th of the same month, and returnable on the third Tuesday of the month; and on the 20th the return was made by the justice, stating the proceedings, as hereinbefore mentioned.

The case was argued before the Supreme Court of the State, and on the 19th of July it pronounced its judgment, affirming

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*Ableman v. Booth and United States v. Booth.*

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the decision of the associate justice discharging Booth from imprisonment, with costs against Ableman, the marshal.

Afterwards, on the 26th of October, the marshal sued out a writ of error, returnable to this court on the first Monday of December, 1854, in order to bring the judgment here for revision; and the defendant in error was regularly cited to appear on that day; and the record and proceedings were certified to this court by the clerk of the State court in the usual form, in obedience to the writ of error. And on the 4th of December, Booth, the defendant in error, filed a memorandum in writing in this court, stating that he had been cited to appear here in this case, and that he submitted it to the judgment of this court on the reasoning in the argument and opinions in the printed pamphlets therewith sent.

After the judgment was entered in the Supreme Court of Wisconsin, and before the writ of error was sued out, the State court entered on its record, that, in the final judgment it had rendered, the validity of the act of Congress of September 18, 1850, and of February 12, 1793, and the authority of the marshal to hold the defendant in his custody, under the process mentioned in his return to the writ of *habeas corpus*, were respectively drawn in question, and the decision of the court in the final judgment was against their validity, respectively.

This certificate was not necessary to give this court jurisdiction, because the proceedings upon their face show that these questions arose, and how they were decided; but it shows that at that time the Supreme Court of Wisconsin did not question their obligation to obey the writ of error, nor the authority of this court to re-examine their judgment in the cases specified. And the certificate is given for the purpose of placing distinctly on the record the points that were raised and decided in that court, in order that this court might have no difficulty in exercising its appellate power, and pronouncing its judgment upon all of them.

We come now to the second case. At the January term of the District Court of the United States for the district of Wisconsin, after Booth had been set at liberty, and after the transcript of the proceedings in the case above mentioned had been

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*Ableman v. Booth and United States v. Booth.*

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returned to and filed in this court, the grand jury found a bill of indictment against Booth for the offence with which he was charged before the commissioner, and from which the State court had discharged him. The indictment was found on the 4th of January, 1855. On the 9th a motion was made, by counsel on behalf of the accused, to quash the indictment, which was overruled by the court; and he thereupon pleaded not guilty, upon which issue was joined. On the 10th a jury was called and appeared in court, when he challenged the array; but the challenge was overruled and the jury empanelled. The trial, it appears, continued from day to day, until the 13th, when the jury found him guilty in the manner and form in which he stood indicted in the fourth and fifth counts. On the 16th he moved for a new trial and in arrest of judgment, which motions were argued on the 20th, and on the 23d the court overruled the motions, and sentenced the prisoner to be imprisoned for one month, and to pay a fine of \$1,000 and the costs of prosecution; and that he remain in custody until the sentence was complied with.

We have stated more particularly these proceedings, from a sense of justice to the District Court, as they show that every opportunity of making his defence was afforded him, and that his case was fully heard and considered.

On the 26th of January, three days after the sentence was passed, the prisoner by his counsel filed his petition in the Supreme Court of the State, and with his petition filed a copy of the proceedings in the District Court, and also affidavits from the foreman and one other member of the jury who tried him, stating that their verdict was, guilty on the fourth and fifth counts, and not guilty on the other three; and stated in his petition that his imprisonment was illegal, because the fugitive slave law was unconstitutional; that the District Court had no jurisdiction to try or punish him for the matter charged against him, and that the proceedings and sentence of that court were absolute nullities in law. Various other objections to the proceedings are alleged, which are unimportant in the questions now before the court, and need not, therefore, be particularly stated. On the next day, the 27th, the court directed



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*Ableman v. Booth and United States v. Booth.*

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two writs of *habeas corpus* to be issued—one to the marshal, and one to the sheriff of Milwaukee, to whose actual keeping the prisoner was committed by the marshal, by order of the District Court. The *habeas corpus* directed each of them to produce the body of the prisoner, and make known the cause of his imprisonment, immediately after the receipt of the writ.

On the 30th of January the marshal made his return, not acknowledging the jurisdiction, but stating the sentence of the District Court as his authority; that the prisoner was delivered to, and was then in the actual keeping of the sheriff of Milwaukee county, by order of the court, and he therefore had no control of the body of the prisoner; and if the sheriff had not received him, he should have so reported to the District Court, and should have conveyed him to some other place or prison, as the court should command.

On the same day the sheriff produced the body of Booth before the State court, and returned that he had been committed to his custody by the marshal, by virtue of a transcript, a true copy of which was annexed to his return, and which was the only process or authority by which he detained him.

This transcript was a full copy of the proceedings and sentence in the District Court of the United States, as hereinbefore stated. To this return the accused, by his counsel, filed a general demurrer.

The court ordered the hearing to be postponed until the 2d of February, and notice to be given to the district attorney of the United States. It was accordingly heard on that day, and on the next, (February 3d,) the court decided that the imprisonment was illegal, and ordered and adjudged that Booth be, and he was by that judgment, forever discharged from that imprisonment and restraint, and he was accordingly set at liberty.

On the 21st of April next following, the Attorney General of the United States presented a petition to the Chief Justice of the Supreme Court, stating briefly the facts in the case, and at the same time presenting an exemplification of the proceedings hereinbefore stated, duly certified by the clerk of the State court, and averring in his petition that the State court had no

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*Ableman v. Booth and United States v. Booth.*

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jurisdiction in the case, and praying that a writ of error might issue to bring its judgment before this court to correct the error. The writ of error was allowed and issued, and, according to the rules and practice of the court, was returnable on the first Monday of December, 1855, and a citation for the defendant in error to appear on that day was issued by the Chief Justice at the same time.

No return having been made to this writ, the Attorney General, on the 1st of February, 1856, filed affidavits, showing that the writ of error had been duly served on the clerk of the Supreme Court of Wisconsin, at his office, on the 30th of May, 1855, and the citation served on the defendant in error on the 28th of June, in the same year. And also the affidavit of the district attorney of the United States for the district of Wisconsin, setting forth that when he served the writ of error upon the clerk, as above mentioned, he was informed by the clerk, and has also been informed by one of the justices of the Supreme Court, which released Booth, "*that the court had directed the clerk to make no return to the writ of error, and to enter no order upon the journals or records of the court concerning the same.*" And, upon these proofs, the Attorney General moved the court for an order upon the clerk to make return to the writ of error, on or before the first day of the next ensuing term of this court. The rule was accordingly laid, and on the 22d of July, 1856, the Attorney General filed with the clerk of this court the affidavit of the marshal of the district of Wisconsin, that he had served the rule on the clerk on the 7th of the month above mentioned; and no return having been made, the Attorney General, on the 27th of February, 1857, moved for leave to file the certified copy of the record of the Supreme Court of Wisconsin, which he had produced with his application for the writ of error, and to docket the case in this court, in conformity with a motion to that effect made at the last term. And the court thereupon, on the 6th of March, 1857, ordered the copy of the record filed by the Attorney General to be received and entered on the docket of this court, to have the same effect and legal operation as if returned by the clerk with the writ of error, and that the case stand for argu-

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*Ableman v. Booth and United States v. Booth.*

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ment at the next ensuing term, without further notice to either party.

The case was accordingly docketed, but was not reached for argument in the regular order and practice of the court until the present term.

This detailed statement of the proceedings in the different courts has appeared to be necessary in order to form a just estimate of the action of the different tribunals in which it has been heard, and to account for the delay in the final decision of a case, which, from its character, would seem to have demanded prompt action. The first case, indeed, was reached for trial two terms ago. But as the two cases are different portions of the same prosecution for the same offence, they unavoidably, to some extent, involve the same principles of law, and it would hardly have been proper to hear and decide the first before the other was ready for hearing and decision. They have accordingly been argued together, by the Attorney General of the United States, at the present term. No counsel has in either case appeared for the defendant in error. But we have the pamphlet arguments filed and referred to by Booth in the first case, as hereinbefore mentioned, also the opinions and arguments of the Supreme Court of Wisconsin, and of the judges who compose it, in full, and are enabled, therefore, to see the grounds on which they rely to support their decisions.

It will be seen, from the foregoing statement of facts, that a judge of the Supreme Court of the State of Wisconsin in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offence against the laws of this Government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State.

In the second case, the State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*,

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*Ableman v. Booth and United States v. Booth.*

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has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the District Court.

And it further appears that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the State court.

These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of *habeas corpus*. But the paramount power of the State court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of *habeas corpus*, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned; for, if the Supreme Court of Wisconsin possessed the power it has exercised in relation to offences against the act of Congress in ques-

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*Ableman v. Booth and United States v. Booth.*

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tion, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offences against our revenue laws, or any other law intended to guard the different departments of the General Government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found.

The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges

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*Ableman v. Booth and United States v. Booth.*

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or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned.

It is, however, due to the State to say, that we do not find this claim of paramount jurisdiction in the State courts over the courts of the United States asserted or countenanced by the Constitution or laws of the State. We find it only in the decisions of the judges of the Supreme Court. Indeed, at the very time these decisions were made, there was a statute of the State which declares that a person brought up on a *habeas corpus* shall be remanded, if it appears that he is confined:

"1st. By virtue of process, by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

"2d. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction." (Revised Statutes of the State of Wisconsin, 1849, ch. 124, page 629.)

Even, therefore, if these cases depended upon the laws of Wisconsin, it would be difficult to find in these provisions such a grant of judicial power as the Supreme Court claims to have derived from the State.

But, as we have already said, questions of this kind must

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*Ableman v. Booth and United States v. Booth.*

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always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the Constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that "this Constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

But the supremacy thus conferred on this Government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free

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*Ableman v. Booth and United States v. Booth.*

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from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy, (which is but another name for independence,) so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly, it was conferred on the General Government, in clear, precise, and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a State or of the United States. And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would



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*Ableman v. Booth and United States v. Booth.*

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inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them.

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquillity, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign States which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another State by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this Government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some

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*Ableman v. Booth and United States v. Booth.*

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tribunal was created to decide between them finally and without appeal.

The Constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this Constitution" and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved; and if such controversies were left to arbitrament of physical force, our Government, State and National, would soon cease to be Governments

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*Ableman v. Booth and United States v. Booth.*

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of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

In organizing such a tribunal, it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to Congress to create it by law; for the States could hardly be expected to confide in the impartiality of a tribunal created exclusively by the General Government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of Congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

These principles of constitutional law are confirmed and illustrated by the clause which confers legislative power upon Congress. That power is specifically given in article 1, section 8, paragraph 18, in the following words:

“To make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.”

Under this clause of the Constitution, it became the duty of Congress to pass such laws as were necessary and proper to

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*Ableman v. Booth and United States v. Booth.*

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carry into execution the powers vested in the judicial department. And in the performance of this duty, the First Congress, at its first session, passed the act of 1789, ch. 20, entitled "*An act to establish the judicial courts of the United States.*" It will be remembered that many of the members of the Convention were also members of this Congress, and it cannot be supposed that they did not understand the meaning and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame. And the law they passed to carry into execution the powers vested in the judicial department of the Government proves, past doubt, that their interpretation of the appellate powers conferred on this court was the same with that which we have now given; for by the 25th section of the act of 1789, Congress authorized writs of error to be issued from this court to a State court, whenever a right had been claimed under the Constitution or laws of the United States, and the decision of the State court was against it. And to make this appellate power effectual, and altogether independent of the action of State tribunals, this act further provides, that upon writs of error to a State court, instead of remanding the cause for a final decision in the State court, this court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

These provisions in the act of 1789 tell us, in language not to be mistaken, the great importance which the patriots and statesmen of the First Congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by States or State tribunals.

In the case before the Supreme Court of Wisconsin, a right was claimed under the Constitution and laws of the United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the District Court of the United States, but it has reversed and annulled the provisions of the Constitution itself,

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*Ableman v. Booth and United States v. Booth.*

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and the act of Congress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or

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*Ableman v. Booth and United States v. Booth.*

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process of any other Government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

Nor is there anything in this supremacy of the General Government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of State sovereignty. Neither this Government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all executive and judicial officers of the several States, (as well as those of the General Government,) shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of Government, with the powers hereinbefore specified, had been adopted by the Convention; and it was in that form, and with these powers, that the Con-

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*Ableman v. Booth and United States v. Booth.*

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stitution was submitted to the people of the several States, for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is *to support this Constitution*. And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State.

We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this Government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead.

But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the

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*Rogers et al. v. Law.*

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tribunals of the United States to revise and correct it, and not for a State court. And as regards the decision of the District Court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a State or the United States, by *habeas corpus* or any other process.

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law. We have already stated the opinion and judgment of the court as to the exclusive jurisdiction of the District Court, and the appellate powers which this court is authorized and required to exercise. And if any argument was needed to show the wisdom and necessity of this appellate power, the cases before us sufficiently prove it, and at the same time emphatically call for its exercise.

The judgment of the Supreme Court of Wisconsin must therefore be reversed in each of the cases now before the court.

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LLOYD N. ROGERS, ADMINISTRATOR OF ELIZA PARK CUSTIS,  
EDMUND L. ROGERS, IN HIS OWN RIGHT, AND AS ADMINIS-  
TRATOR OF ELIZA L. ROGERS AND ELEANOR A. ROGERS, AP-  
PELLANTS, v. JOSEPH E. LAW, BY MARY ROBINSON, HIS NEXT  
FRIEND.

After an appeal has been docketed and dismissed under the 63d rule of court at a prior term of the court, the same case cannot again be docketed without a new appeal.

THIS was an appeal from the Circuit Court of the United



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*Brittan v. Barnaby.*

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States for the District of Columbia, holden in and for the county of Washington.

The dates of the several steps taken with respect to the appeal are stated in the opinion of the court.

Mr. Justice McLEAN delivered the opinion of the court.

The facts, as they appear of record, on the motion to dismiss this appeal, are as follows:

The decree of the Circuit Court was pronounced 21st January, 1856. An appeal was prayed from said decree, and granted the same day, 21st January, 1856. This appeal was docketed and dismissed under the 63d rule of this court, at December term, 1856, to wit: 27th February, 1857; and a writ of *procedendo* was issued 19th May, 1857.

The appellants filed this record and docketed the case 3d April, 1857. The record in this case stated that an appeal had been prayed and allowed, but does not give any date. There is no statement of any prior appeal in this record. The appeal bond is dated 4th February, 1856. There is no citation in this record.

The appellants filed the citation and bond, 30th April, 1857, and directed the clerk to docket this case, to transfer the record filed in the last case to this, to attach said citation and bond to said record, and to print all the papers in this case. There is no statement of any other appeal than that set out; and this seems to be the appeal that was docketed and dismissed 27th February, 1857.

As the record now stands, it is not perceived how this appeal can be sustained.

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JOHN W. BRITTAN, APPELLANT, v. WILLIAM A. BARNABY, CLAIM-  
ANT OF THE SHIP ALBONI.

The freight upon a shipment of goods is payable, according to general rules, when the merchandise is in readiness to be delivered to the person having a right to receive it, and when the consignee has had the opportunity to exam

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*Brittan v. Barnaby.*

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ins the goods, to see if the obligations of the bill of lading have been fulfilled by the ship-owner.

Where the consignee of a ship gave notice to the consignee of the goods, requiring payment of the freight of the goods as they should be landed from the ship on the wharf, and the consignee of the goods offered to pay the freight of such of the merchandise as had been landed, the latter did all that he was bound to do under the notice, although not bound to do so by the commercial law, and the refusal of the consignee of the ship to receive such *pro rata* freight was unjustifiable.

When the ship-master has a larger shipment under one bill of lading than can be landed in the business hours of one day, he must take care not to land it in such quantities as to be unable to ascertain the *pro rata* freight. Unless he takes this care, the goods landed will be under his care and responsibility without additional expense to the consignee of them until they shall be ready for delivery.

Where the entire freight was demanded when only a part of the goods was ready to be delivered, and the entire freight was refused when the goods were all landed, except upon the condition that the consignee of the goods would pay cartage and storage, this was contrary to the general law upon the subject.

This general law and the nature of freight examined and explained.

Neither party can require from the other that the merchandise shipped under one bill of lading shall be put up into parcels for delivery or for the payment of freight. If the shipment is large, or cannot be landed in a day, the master has a right to ask for security or arrangement for the *pro rata* freight. But he cannot demand the payment of the freight of the entire shipment before the consignee has an opportunity to examine the goods.

The ship is not bound to land an entire shipment in a day; and when landed on different days, if the shipper disregards the notice that such will be the case, and shall not be present to receive the goods, and has made no arrangement for the freight, then they may be stored in the ship-owner's name, to preserve his lien upon them for freight, for safe keeping, at the consignee's expense and risk.

A stamp upon the back of the bill of lading, stating, amongst other things, "that the entire freight was payable prior to delivery, if required," which was put there by the ship's owner, but which there was no evidence was recognised by the shipper as part of his contract, cannot vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery.

The general rule is, that the delivery of the goods at the place of destination, according to the bill of lading, is necessary to entitle the ship to freight. The conveyance and delivery is a condition precedent, and must be fulfilled.

This general rule may be varied by stipulations; but they must be in writing, and be signed by the parties, before they can control the operation of the law merchant.

It is not enough to establish that this was the mode of doing business by the ship-owner, nor that a practice prevailed in conformity with it at the port to which the goods were carried and delivered to a consignee.

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*Brittan v. Barnaby.*

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Such a stamp is not equivalent to a memorandum upon a policy of insurance, which is always on the face or the margin of the policy. The rules with respect to policies of insurance explained.

The practice at San Francisco cannot be received as a custom, and therefore obligatory. Moreover, the practice is not established by evidence.

THIS was an appeal from the Circuit Court of the United States for the districts of California, sitting in admiralty.

It was a libel filed by Brittan, under the circumstances stated in the opinion of the court. The District Court dismissed the libel, and the Circuit Court affirmed the decree.

It was argued by *Mr. Sherwood* for the appellant, and *Mr. Broom* for the appellee.

The points only made by the counsel can be noticed. On the part of the appellant, they were the following:

1. The principle of mercantile law, that the consignee of the goods has a right to insist that they shall be *discharged* from the vessel, and that he may examine them before he makes himself liable for the freight, is elementary.

The carrier is not at liberty to insist that the goods shall not be landed before he can call upon the merchant for freight. (Abbott on Shipping, 5th Am. ed., pp. 375, 376, 377; 3d Kent's Com., p. 214, and the notes and authorities there cited; Flanders on Shipping, p. 281, art. 281; Certain Logs of Mahogany, 2d Sumner, 600; The Salmon Falls Manufacturing Co. v. The bark Tangier; Op. Justice Curtis; Monthly Law Reporter for May, 1858, p. 6.) This principle is also fully established by the civil law. (1 Valin, Liber 6, tit. 8, p. 665.)

2. In this action, all the goods set forth in the bill of lading were not discharged in one day. The reason does not appear. A part having been discharged on the 24th day of October, the libellant offered to pay the freight on that part, and thus placed it in the power of the carrier to have relieved himself from the responsibility of sending the goods to the warehouse.

The third point related to the usage set up by the appellee.

The fourth and fifth related to the stamps upon the bill of lading; and upon these points were cited 1 Smith's Leading Cases, 320, and 1 Parsons on Contracts, 708.

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*Brittan v. Barnaby.*

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The points made by the counsel for the appellee were the following:

1. By the general mercantile law, the obligation of the carrier does not extend beyond carrying from *port to port*; for *this* he receives his freight money. All necessary and proper charges that accrue on the goods after arrival, as wharfage, cartage, &c., must be paid by the shipper. If he insist upon a delivery of all the goods at once, before payment, such charges as this renders necessary must be borne by him. According to the course of the California trade, as it appears in evidence, with respect to the lading and discharging of ships, the state of the wharves, &c., storage is proper and necessary where all the goods embraced in the bill of lading are not got out in one day; for the master is not at liberty to leave goods exposed on a wharf, but it is his duty to see that they are safely kept. (Abbott on Shipping, 7th Am. ed., 494, 495; *ib.*, 491, 492; Flanders on Shipping, 273, 275, 276; Story on Bailments, 566; 3 Camp. R., 360; 4 T. R., 260.)

2. There is no obligation on the master to deliver part of the goods in a single bill of lading upon payment of part of the freight. (Abbott on Shipping, 493, marginal paging 377.)

3. The contract of the parties here is express, that the consignee shall receive the goods at "*the ship's tackles*," and that freight must be paid "*prior to delivery, if required*." The stamp is a part of the contract. (1 Duer on Insurance, 75, 141; 4 Mass., 245; 14 Mass., 322; 10 Pickering, 228; *ib.*, 298; 4 Metcalf, 230; 8 Metcalf, 226; 16 Vermont, 26.) These cases are cited. (Chitty on Bills, 11th Am. ed., 141, note.)

4. A good and valid usage was proved; and that usage controls the general rule of mercantile law, if that rule be different from what is contended for. (1 Duer on Insurance, 255, 269, 271, 264, sec. 58; 14 Wendell, 26; 17 Wendell, 207; 9 Wheaton, 581, 230, 231; 1 Duer, 186; *ib.*, 267.)

5. Even if the usage were not perfect and universal, but partial, yet as it was the usage of D. L. Ross & Co., and the libellants had notice of it by previous dealings with that house, and took a bill of lading with notice stamped on its face, it is binding on them. (1 Duer on Insurance, 254; *ib.*, 263, sec. 57,

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*Brittan v. Barnaby.*

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286, note, and cases cited; 4 Cow. and Hill's ed. of Phillips on on Ev., 511.)

Mr. Justice WAYNE delivered the opinion of the court.

This cause involves an important commercial principle, of daily recurrence in practice, which does not appear to be well understood and settled in San Francisco. Our decision will correct the misapprehension there in regard to the delivery of merchandise by ship-owners, and the payment of freight for its transportation.

The libellant was the owner and consignee of goods of a value exceeding four thousand dollars, which were shipped in good order and condition at New York, on board of the ship *Alboni*, to be carried and delivered in San Francisco, in the same order, at a rate of freight expressed in the bill of lading. It amounted to two hundred and forty-seven dollars and twelve cents, including eleven dollars and seventy-seven cents for primage. The bill of lading, upon its face, is in the ordinary form; but there was a stamp upon the back of it, in these words: "That the goods were to be delivered at the ship's tackles when ready for delivery—not accountable for loss or damage by fire or collision; freight payable prior to delivery, if required; contents unknown." The proctors in the cause agreed that those words were stamped on the original bill of lading.

The ship arrived at San Francisco. Notice of it was given to the libellant by the consignee of the ship; and he also required payment of the freight of the goods as they should be landed from the ship on the wharf, and that if it was not paid, and the goods received by four o'clock of the day, such of them as had been landed would be placed in a warehouse for safe keeping, at the expense of the libellant. The notice and the requirement are taken from the second article of the respondent's answer to the libel. He adds, that the libellant had refused to pay the freight according to the terms of the bill of lading.

The testimony discloses what the respondent considered to be its terms, and the refusal of the libellant to acquiesce in his interpretation.

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*Brittan v. Barnaby.*

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The goods were landed from the ship in parcels, on different days, from the 24th to the 27th of October, inclusive. The clerk of the libellant attended on each day to receive them. In conformity to the notice which had been given, he offered to pay the freight of such of the merchandise as had been landed. The consignee of the ship refused to receive it, or to deliver such goods, claiming that he had a right to demand the freight upon the whole shipment, when he was only ready to deliver a part of it. In the assertion of this right (certainly not in conformity with the notice he had given to the libellant) the respondent from day to day warehoused the goods.

The libellant did all he was bound to do under the notice which had been given to him. He could not have done more. The respondent's refusal to deliver the parcels as they were landed cannot be justified, under the notice he had given, by any delay there may have been in the delivery, either from the necessity of weighing or measuring them, or from the claim made by him to have the freight paid upon the whole shipment before he would deliver a part of it. He had taken his course, and the libellant acquiesced in it, by offering to pay the freight on each parcel as it was put on the wharf, though not bound to do so by the commercial law. The respondent's refusal has no justification, either in law, nor can it be vindicated by any evidence in the cause.

We do not mean to say that the libellant had a right to take the parcels on the days they were landed, without the payment of a *pro rata* freight; but where a ship-master has a larger shipment under one bill of lading than he can land in the business hours of a day, as he has the control of unloading the cargo, he must take care not to do it in such quantities that he may not be able to have the *pro rata* freight ascertained in the only way in which it can be done. Until it shall be done, he is not in readiness to deliver such part, or to demand the freight which may be due upon it. Goods so landed will be under his care and responsibility, without additional expense to the consignee of them, until they shall be ready for delivery.

Ordinarily, no difficulty arises between the ship's owner and

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*Brittan v. Barnaby.*

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the consignee of the goods; their interest, convenience, and responsibilities, usually suggest to them some arrangement for the freight beforehand, by which goods landed from day to day may be taken without delay by the consignee of them. In this instance, however, no opportunity was given to the libellant to make such an arrangement, the consignee of the ship having absolutely demanded the whole freight of the shipment as the condition for the delivery of any part of it.

On the fourth day, when all of the libellant's shipment had been landed, and before they were sent to a warehouse, he demanded from the consignee of the ship a delivery order for all the merchandise specified in the bill of lading, tendering at the same time, in gold, the whole freight due. The delivery order was refused, the answer being that the goods were subject, in addition to the freight, to a charge for storage and cartage. The last was also warehoused by the respondent, as those of the three previous landings had been.

The foregoing is a sufficient statement of the facts and evidence in this case for the decision of it. It will not be necessary to notice again the attendance of the clerk of the libellant on the days of landing, to receive the goods and pay the freight.

The word freight, when not used in a sense to imply the burden or loading of the ship, or the cargo which she has on board, is the hire agreed upon between the owner or master for the carriage of goods from one port or place to another. That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it. Then the freight must be paid before an actual delivery can be called for. In other words, the rule is, in the absence of any agreement to the contrary of it, that freight, under an ordinary bill of lading, is only demandable by the owner, master, or consignee of the ship, when they are ready to deliver the goods in the like good order as they were when they were received on board of the ship. Such is the general rule. Neither party can *require* from the other that the merchandise shipped under one bill of lading shall be put up into parcels for delivery, or for the payment of freight. They may do so by stipulation in the bill of lading,

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*Brittan v. Barnaby.*

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or by subsequent agreement, for either of the purposes just mentioned. The master is bound to deliver the goods in a reasonable time. What may be so, depends upon the facilities there may be for the discharge of the cargo at the port of delivery, and the impediments in the way of it. When the shipment is large, or, from the master's storage of it, it cannot be landed in a day, if he lands a part of it, his lien upon the whole gives him the power to ask from the consignee of the merchandise a satisfactory security for the payment of the entire freight as called for by the bill of lading. But a security or arrangement is all that he can ask. He may not demand that the whole freight of the shipment should be paid before the consignee has had the opportunity to examine his goods, to see if the obligations of the bill of lading have been fulfilled by the ship-owner. Nor is the ship bound to land an entire shipment in a day, for the proper storage of the goods is the master's care, and he may do it in such a way as may be most advantageous to the ship, taking care that it shall not be done to the injury of the goods, or in such a manner as to produce unreasonable delay in the delivery of them. And when landings of the same shipment are made on different days, if the shipper disregards the notice given to him that such will be the case, and he shall not be present to receive the goods, and has not made an arrangement to secure the payment of the freight, they may be stored for safe keeping at the consignee's expense and risk, in the ship-owner's name, to preserve his lien for the freight. This course was not pursued in this case by the consignee of the ship. He attempts to justify what he did upon the allegation in his answer to the libel, that the bill of lading contained a stipulation, that the freight to be earned on the whole shipment was payable when a portion of it had been landed.

The bill of lading, upon the face of it, is the ordinary one between parties for the transportation of merchandise. The merchandise mentioned in it was to be carried from New York to San Francisco at fixed rates for freight, with primage and average accustomed. There is no other stipulation or condition in it than the undertaking for carrying the goods, and



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*Brittan v. Barnaby.*

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that of the shipper to pay the freight. But the consignee of the ship claimed that the stamp upon the back of the bill of lading was equivalent to one. So his counsel contended in argument. This stamp was in red ink, and was put on the bill of lading by the ship's owner. We will suppose it had been made by Captain Barnaby before he signed the bill of lading. But it was not signed by the parties, nor is there any proof that it was ever recognised by the shipper as a part of his contract. Nothing seems to have been said about it when the bill of lading was signed, nor until it was claimed in San Francisco to be a part of it. It no doubt has a relation to the subject-matter of the bill of lading, and was put there by Captain Barnaby for that purpose; but unless it received the assent of the shipper, it cannot vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery. The question we are now considering is not what effect might be given to such a stamp upon a bill of lading by proof that the parties, at the time it was made, adopted it as a stipulation or agreement that the shipper was to pay the whole freight upon his shipment when a portion of it had been landed from the ship; but the question is, whether such a stamp, *of itself*, upon a bill of lading, can change the well-known commercial rule in respect to the delivery of goods and the payment of freight. It is that which is asked in this case by the respondent. There is not a word of proof that the shippers in New York, or the consignee in San Francisco, ever regarded it in such a light; none that Captain Barnaby considered the stamp to be a part of the bill of lading assented to by the shipper, until it was asserted by him to be so, in his answer, after the consignee of the ship had attempted to enforce it, as a part of the contract, upon the libellant. It was properly resisted. The personal obligation to pay freight rests upon a bill of lading, when one has been given, and the payment of it is made a condition of delivery. The general rule is, that the delivery of the goods at the place of destination, according to the bill of lading, is necessary to entitle the ship to freight. The conveyance and delivery is a condition precedent, and must be fulfilled. (8 Kent, 218.)

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*Brittan v. Barnaby.*

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Such a stamp cannot be considered a stipulation, according to the legal meaning of that word. All writers upon commercial law use the word stipulation to denote a particular engagement, which may be insisted upon, before it can control the general operation of law, or vary a contract. Such stipulations are not uncommon between ship-owners and shippers of merchandise, in charter-parties and in bills of lading. But when done in either, they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant, in respect to those instruments, is not to prevail; and the stipulation must be in writing, and be signed by the parties, before it can be received as an auxiliary to explain how the contract is to be performed. A memorandum or stamp upon the back of a bill of lading is insufficient for such a purpose, though the ship-owner may have made it as an intimation of *his mode* of doing business, or that a practice prevailed in conformity with it at the port to which the goods were to be carried and delivered to a consignee. An attempt was made to assimilate the stamp in this case to a memorandum on a policy of insurance. In the first place, as loose, indefinite, and dangerous, as some of the decisions in the English and American reports are, concerning memorandums of that kind, no case can be found in either, in which effect has been given to any memorandum which was not on the face or in the margin of the policy. But if such a case can be found, we should not feel ourselves at liberty to extend it to a bill of lading for the transportation of merchandise.

Those instruments of commerce are construed by very different principles and usages. The cases cited by counsel to show that the memorandums upon the face of the one were analogous to a stamp put upon a bill of lading, do not apply. Neither do the texts from Duer, 75, 141, do so. The rule in respect to policies of insurance is, that it is not material whether the written words of a policy are inserted in the body of the instrument, or written on its face or on the margin of it; but they must be there in fact; must have been written before the execution of it, or by mutual consent after the execution, and before the commencement of the risk. Thus they

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*Brittan v. Barnaby.*

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then form parts of the contract, it having been determined, from the usages of insurances, that the parties contracted in reference to them, and that the signature and acceptance of the policy was proof that they had done so. All of the other cases cited are agreements, varying, in some particulars, the payment of notes of hand, entered into contemporaneously with the execution of the notes, and which, by proofs, were shown to have been meant by the parties to be a part of them. An attempt was also made to show that a practice prevailed in San Francisco which gave an effect to the stamp upon the bill of lading, so as to control the general rules of commercial law in respect to the payment of freight, and the delivery of merchandise from ships. Whatever may be the practice there, or however general it may be, it is too recent in its use to make an exception, on the ground that it was a custom. The trade of San Francisco is already large; every day develops its resources and the advantages of its position for commerce. No doubt it has not as yet those facilities for the landing of merchandise and loading of ships which our older ports have; but that will not give to any practice there, however general it may have become, the force of custom to release its merchants from the obligation of an ordinary bill of lading. If inconveniences exist in the particular just mentioned, it will be best for the merchants of San Francisco, and those with whom they deal in other parts of the world, that the contract of a bill of lading should have its fixed meaning and obligation, and that it is only alterable by express stipulations made in the way which has been already stated in the decision.

The testimony, however, in this case shows a very uncertain opinion and a fluctuating practice in San Francisco upon the subject of the delivery of shipments of goods and the payment of freight; that such a demand as was made upon the libellant to pay his freight upon all the merchandise mentioned in his bill of lading, when only a portion of it had been landed upon the wharf, had only been acquiesced in by many of the merchants there to avoid trouble, to get early possession of their importations, and from an unwillingness to be troubled with lawsuits. There are also differences of opinion as to the effi-

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*Brittan v. Barnaby.*

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eacy of such a stamp as there was upon the bill of lading in this case, many of them, from their experience and knowledge of trade elsewhere, having a more correct apprehension of the commercial law than the reverse of it, which was attempted to be imposed upon the libellant. Nor can any previous assent to the usage of a particular firm engaged in the shipping business, though acquiesced in by one who had had other dealings with it, be interpreted into an agreement so as to deprive him of a right under an ordinary bill of lading subsequently made.

The view which we have given of this case determines the whole controversy. It comprehends every point raised by the record, or made in the argument of it. The respondent having in the first instance demanded the entire freight called for by the bill of lading, without any right to do so, and having refused to deliver the merchandise belonging to the libellant when the last parcel of it was landed on the wharf, and when the freight due upon the whole of it was tendered, on the ground that there were due charges for cartage and storage, *did so without color of law* for such refusal. Our judgment is, that those charges must be paid by the respondent, and we shall reverse the decision of the court below, and direct a mandate to be sent to the Circuit Court to order a decree for the libellant for the sum of four thousand three hundred and sixty-seven dollars forty-five cents, with interest from the 2d day of November, 1855. (9th vol. Stat. at L., 181.)

The sum mentioned is proved to have been the value of the libellant's merchandise after freight and primage had been deducted, when it was wrongfully detained by the respondent. The respondent will also be charged with the costs which have been incurred in the prosecution of this libel.

Mr. Justice DANIEL dissents to the decision in this case, upon the grounds that the court of admiralty in this country, as in England, can take no cognizance of charter-parties or bills of lading, and because this case was within the plain jurisdiction of the courts of the State of California, either at common law or in equity.

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*Commissioners of Knox County, Indiana, v. Aspinwall et al.*

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THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX, PLAINTIFFS IN ERROR, *v.* WILLIAM H. ASPINWALL, JOSEPH W. ALSOP, HENRY CHAUNCEY, CHARLES GOULD, AND SAMUEL L. M. BARLOW.

Where the statute of a State provided that the board of commissioners of a county should have power to subscribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of election, and the board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute, it is too late to call in question the existence or regularity of the notices in a suit against them by the holders of the coupons attached to the bonds, who were innocent holders, in this collateral way.

In such a suit, according to the true interpretation of the statute, the board were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock.

The bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for evidence of a compliance with the condition to the grant of the power.

A suit could be maintained upon the coupons, without the production of the bonds to which they had been attached.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

The case is stated in the opinion of the court.

It was argued by *Mr. Reverdy Johnson* and *Mr. R. W. Thompson* for the plaintiffs in error, on which side there was also a brief by *Mr. McDonald* and *Mr. Porter*, and for the defendants in error by *Mr. Benjamin* and *Mr. Vinton*, on which side there was also a brief by *Mr. Judah*.

Upon the trial in the court below, the general issue and five special pleas were filed. These pleas alleged the want of a previous legal notice; that there ought to have been a notice of the intention of the board to raise the subscription from \$100,000 to \$200,000; that there was no record of the judgment of the board; that the bonds were issued all at the same time, and not at the rate of one-fifth per year, as the statute

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*Commissioners of Knox County, Indiana, v. Aspinwall et al.*

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required; and that the contract was in violation of the sixth section of the tenth article of the Constitution of Indiana, which took effect on the 1st of November, 1851.

To these pleas there was a demurrer, which was sustained by the Circuit Court.

The counsel for the plaintiffs in error contended that the demurrer admitted these facts; that the bill of exceptions contained also prayers to the court, which were refused, and instructions given to the jury, upon both points of which there was error; that corporations could not go beyond their powers, and of course the board could only bind itself according to law; that the plaintiffs were bound to inquire into this; that the notice was only published three times in a weekly newspaper; that it was the policy of the board to keep back the notice as long as possible; that the law did not authorize the issue of coupons, because it said that interest should be paid to the holder of the bond.

The counsel for the defendants in error contended that the act must be liberally construed for the objects set forth, as the act itself directed should be done; that bonds were usually issued with coupons, and were authorized by the statutes of Indiana; that the validity of the election might have been tested by any elector interested, (Revised Statutes of 1848, p. 140 to 142;) that no proceeding can now be had to call it in question; that a purchaser had a right to presume that those whom the law intrusted with the duty complied with all the preliminary acts which it enjoined on them, and that it was not necessary to produce the bonds in court.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Indiana.

The suit was brought in the court below against the board of commissioners of Knox county, to recover the amount due upon two hundred and eighty-four coupons, each for the sum of sixty dollars, the whole amounting to the sum of seventeen

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*Commissioners of Knox County, Indiana, v. Aspinwall et al.*

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thousand and forty dollars. The coupons were payable at the North River Bank, in the city of New York—one hundred and forty-two of them on the 1st of March, 1856, and the remaining number on the 1st of March, 1857. These coupons were originally attached to one hundred and forty-two bonds issued by the defendants, for \$1,000 each, the bonds payable at the bank above mentioned, twenty-five years from date, to the Ohio and Mississippi Railroad Company, or bearer, with interest at the rate of six per cent. per annum, payable annually on the 1st of March, at the bank, upon presentation and delivery of the proper coupons hereto attached, by the auditor of said county.

The coupons declared upon and sought to be recovered are those which were attached to these one hundred and forty-two bonds, and represented the interest due thereon on the first of March, 1856 and 1857. The plaintiffs are the holders and owners of these coupons.

The main ground of the defence set up and relied on to defeat the recovery is, that the defendant, the board of commissioners, possessed no authority to execute, or to authorize to be executed, the bonds or coupons in question; and hence, that they are obligations not binding upon the county of Knox, which this board represents. Our chief inquiry, therefore, will be, whether or not these several obligations were executed and put into circulation, as evidences of indebtedness, by competent and legal authority.

The defendant is a body corporate, under the laws of the State of Indiana, by the name of the board of commissioners of the county, and very large powers are conferred upon it in matters relating to the police and fiscal concerns of the county. The auditor of the county is to act as its clerk, and the sheriff is to attend its meetings and execute its orders. It has a common seal, and copies of its proceedings, signed and sealed by the clerk, are evidence in courts of justice. It has power to dispose of the property of the county; to adjust accounts against it; to raise revenue, and examine accounts of disbursing officers; and an appeal lies from its decisions to the Circuit Court. (1 R. S. of Indiana, pp. 180, 187.)

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*Commissioners of Knox County, Indiana, v. Aspinwall et al.*

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On the 14th February, 1848, the Legislature of Indiana incorporated the Ohio and Mississippi Railroad Company, and by the 12th section of the charter provided as follows:

"It shall be lawful for the county commissioners of any county in the State of Indiana through which said railroad passes, for and in behalf of said county, to authorize, by order on their records, so much of said stock to be taken in said railroad as they may deem proper, at any time within five years after opening the books of subscription to said stock: *Provided, however,* That it shall be, and is hereby made, the duty of said county commissioners, in any county through which said railroad may pass in the State of Indiana, to subscribe for stock for and on behalf of said county, if a majority of the qualified voters of said county, at any annual election, within five years after said books are opened, shall vote for the same." (Sess. Laws 1848, page 619.)

This act was amended on the 15th January, 1849; and in the second section it was declared to be the duty of the sheriffs of the counties—and, among others, Knox county, the one in question—forthwith to give notice of an election to be held on the first Monday of March then next, to determine whether said county would subscribe for the stock of the Ohio and Mississippi Railroad Company, &c.; and if a majority of the votes shall be given in favor of the subscription, the county board of commissioners shall subscribe to said stock, &c., for the county, to an amount not less than \$100,000; *Provided,* That the county board of any of said counties may, within one week prior to the said election, increase or lessen the amount to be subscribed, of which notice shall be given at the different precincts of said county on the day of the election, &c.

The third section provided that the county subscription shall be payable in county bonds, bearing interest at the rate of six per cent. per annum, payable annually on the first day of March, redeemable at such time and place as the directors of the company may determine, within thirty years from the date of the subscription. The section then provides for the levying of a tax annually upon the county by the board of commissioners, to meet the accruing interest on the bonds.



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*Commissioners of Knox County, Indiana, v. Aspinwall et al.*

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The plaintiffs gave in evidence, on the trial, that at a meeting of the board of commissioners of the county of Knox, on the 26th February, 1849, it ordered, under the power given in the second section above referred to, that the county subscribe \$200,000 of the capital stock of the Ohio and Mississippi Railroad Company. And, also, that at a meeting on the 25th October, 1850, after reciting that, in accordance with the wishes of the voters of the county, as expressed at the election held for that purpose in the several townships on the first Monday of March, 1849, it is ordered that the auditor, in the name and for the county of Knox, subscribe to the capital stock of the Ohio and Mississippi Railroad Company four thousand shares of fifty dollars each, or the sum of \$200,000; and that the auditor be authorized to vote at all elections and meetings of stockholders, or to appoint a proxy in his stead. And that, in pursuance of this direction, the auditor subscribed the four thousand shares, and received certificates in the name of the board of commissioners of the county for the same; and also executed and delivered the bonds of the county, as provided for in the third section of the act of 1849, attaching thereto coupons for the interest. The bonds and coupons in question were issued under this authority.

This is the substance of the case, as presented on the record.

The ground upon which the want of authority to execute the bonds in question is placed, is the alleged omission to comply with the requisition of the statute of 1849, in respect to the notices to be given of the election to be held on the first Monday of March, at which a vote was to be taken for or against a subscription of stock to the railroad company.

It is insisted that an irregularity or omission in these notices had the effect to deprive the board of this authority, or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election, and not therefore entitled to the character of *bona fide* holders of the securities.

The act in pursuance of which the bonds were issued is a public statute of a State, and it is undoubtedly true that any

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*Commissioners of Knox County, Indiana, v. Aspinwall et al.*

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person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The court must therefore look into the statute for the purpose of determining this question; and upon looking into it, we see that full power is conferred upon the board to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote not has been in conformity with the law.

This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?

The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts pre-

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*Commissioners of Knox County, Indiana, v. Aspinwall et al.*

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vously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way.

Another answer to this ground of defence is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription, by the board, to the stock of the railroad company, and the issuing of the bonds.

The bonds on their face import a compliance with the law under which they were issued. "This bond," we quote, "is issued in part payment of a subscription of two hundred thousand dollars, by the said Knox county, to the capital stock, &c., by order of the board of commissioners," in pursuance of the third section of act, &c., passed by the General Assembly of the State of Indiana, and approved 15th January, 1849.

The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power. This principle was recently applied in a case in the Court of Exchequer in England. (6 Ellis & Blackburn, p. 327, *The Royal British Bank v. Tarquand*.) It was an action upon a bond against the defendant, as the manager of a joint stock company. The defence was a want of power under the deed of settlement or charter to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as should from time to time by a general resolution of the company be authorized to be borrowed. The resolution passed was considered defective. Jervis, Ch. B., in delivering the judgment of the court, observed: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission

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*Commissioners of Knox County, Indiana, v. Wallace.*

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to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." (See also 5 Ellis and Bl., p. 245, S. C., and 25 E. L. and Eq., p. 114, *Macle v. Sutherland*.) The principle we think sound, and is entirely applicable to the question before us.

A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each instalment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation.

Some other minor points were made in the case upon the argument, which we have considered, but which it is not important should be particularly noticed. We are satisfied the judgment below is right, and should be affirmed.

Mr. Justice DANIEL dissenting.

In the case of the Knox County Commissioners *v. Aspinwall et al.*, it is my opinion, in the first place, that the Circuit Court had not jurisdiction of the cause, one of the parties being a corporation; and, secondly, I think that the commissioners being known to be a party, it was the duty of those who dealt with them to ascertain the extent of their powers.

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**THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX, PLAINTIFFS IN ERROR, *v.* DAVID C. WALLACE.**

The decision of the court in the preceding case again affirmed.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Indiana.

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*Commissioners of Knox County, Indiana, v. Wallace.*

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It was similar, in most of its aspects, to the preceding case. In this case there was no notice whatever of the increase of the stock made by the board at their meeting on 26th February, 1849, and also it was shown that less than a majority of the whole vote of the county was polled.

It was argued by *Mr. R. W. Thompson* for the plaintiffs in error, and *Mr. McLean* for the defendant.

**Mr. Justice NELSON** delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Indiana.

The suit was brought by Wallace against the board, upon several coupons, for instalments of interest which had been attached to certain bonds issued by the defendants to the Ohio and Mississippi R. R. Co. The coupons were owned by the plaintiff, and had been duly presented for payment, which was refused. The defendants plead the general issue, and six special pleas, to which there were replications, except the second and sixth pleas, to which there were demurrers.

The court sustained the demurrers. There were afterwards amendments and demurrers to pleadings not very intelligible in the record, and seem not to have been relied on by either party. The case was tried upon the general issue, and the facts disclosed upon the trial were substantially the same, *mutatis mutandis*, as those which were proved or admitted in the previous case of *Aspinwall* and others against these same defendants. After the evidence was closed, the defendants presented ten prayers to the court, upon each of which instructions were given. It is unnecessary to go through them; the questions involved have already been examined in the case above mentioned, and the result there arrived at affirms the judgment in this case.

Judgment affirmed.

**Mr. Justice DANIEL** dissented.

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*Chamberlain et al. v. Ward et al.*

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**PHILO CHAMBERLAIN AND JOHN H. CRAWFORD, CLAIMANTS OF THE PROPELLER OGDENSBURGH, APPELLANTS, v. EBER B. WARD AND STEPHEN CLEMENT, SURVIVORS OF SAMUEL WARL DECEASED.**

In a collision which took place upon Lake Erie, between the propeller Ogdensburgh and the steamer Atlantic, the propeller was in fault—

1. Because she did not have a competent and skilful officer in charge of her deck, and his want of qualifications and skilfulness contributed to the collision. Owners of steamships must employ skilful and competent officers; and the remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all the time they have charge of the deck.
2. Because she did not have signal lights properly displayed, as required by law. But the failure to show the lights, which are directed by the act of Congress does not of itself throw the entire responsibility upon the offending party, where the other vessel also is in fault.
3. Because the officer in charge of her deck neglected to seasonably change her helm, and persistently kept her on her course, after he discovered the signal lights of the steamer.

The Atlantic was in fault—

1. Because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel, after he discovered the white lights, which subsequently proved to be the white lights of the propeller.
2. She was also in fault because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engines after he discovered those lights, so as to prevent collision.
3. Because she did not have a vigilant and sufficient look-out. Ocean steamers usually have two look-outs, in addition to the officer of the deck; and in general they are stationed, one on the larboard and the other on the starboard side of the vessel, as far forward as possible, and, during the time they are so engaged, they have no other duties to perform; and no reason is perceived why any less precaution should be taken by first-class steamers on the lakes.

Being a case of mutual fault, the decree of the Circuit Court, apportioning the damages, is affirmed.

THIS was an appeal from the Circuit Court of the United States for the southern district of Ohio.

It was a case of collision between the propeller Ogdensburgh and the steamer Atlantic, under the circumstances which are particularly set forth in the opinion of the court.

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*Chamberlain et al. v. Ward et al.*

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The reader will bear in mind the difference between the white lights, which are carried by all vessels, and the signal lights required by the act of Congress of 1849 to be carried by steamboats and propellers navigating the lakes. These are directed to be a triangular light, shaded green on the starboard side and red on the larboard side, with reflectors, and to be of a size to insure a good and sufficient light.

It was argued by *Mr. Stanbery* and *Mr. Spalding* for the appellants, and by *Mr. Newberry* and *Mr. Swayne* for the appellees.

All that the reporter can do in the present case is merely to state the general propositions upon each side, without stating the numerous arguments, illustrations, and authorities, by which they were supported.

The following points are taken from the brief of *Mr. Spalding* for the appellants:

1. The propeller *Ogdensburgh* was on her true course, north-east by east, when she first made the steamer's light.

2. She did not change her course.

3. It was the duty of the propeller, under existing circumstances, to keep her course. To have thrown her helm "*a-port*," with the steamer from two to three points of the compass on her starboard bow, would have been a gross violation of the rules of navigation. (*London Packet*, 2 Robinson, jun., 213; *Steamer Ocean*, *Nautical Magazine*, vol. 1, No. 5, p. 355; *Steam Tug Sampson*, 3 Wallace, jun., —; *American Law Register*, vol. 8, p. 337; *The Santa Claus*, *Olcott's Rep.*, 428.)

4. The light of the *Atlantic*, as first made from the propeller, was by no means "*a red signal light*;" it was an ordinary white light. The *Atlantic* was only three or four times her length off, and was consequently swinging under "*a port helm*," when she showed her "*red light*" to the propeller.

5. At the instant of collision, and when it was inevitable, the helm of the propeller was ordered "*a-starboard*." But the testimony shows that the object was solely to lessen the amount

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*Chamberlain et al. v. Ward et al.*

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of damage by receiving a glancing stroke upon the bows, rather than a direct blow upon the broadside of the propeller.

The headway of this vessel was then so much deadened, that the effect of "*starboarding the helm*" was scarcely perceptible.

Be this as it may, however, the steamboat had no right to place the propeller in such jeopardy that the error of a moment might cause her destruction. If an error was committed in giving the order to "*starboard*," it could not, under the circumstances, be deemed "*a fault*." (The Prop. *Genesee Chief v. Fitzhugh et al.*, 12 Howard U. S. Rep., 461; *Shute v. Goslee*, Am. Law Reg., vol. 3, p. 476.)

6. The propeller displayed proper lights.

7. The propeller kept a vigilant "look-out," was managed in a prudent and seamanlike manner, and adopted all proper precautions to avoid the collision.

The steamer Atlantic was wholly in fault:

1. She had no sufficient "look-out" on the night in question. The inside of the pilot-house was not the proper place from whence to keep watch for approaching vessels. "A competent and vigilant 'look-out' should have been stationed at the forward part of the steamer, in the position best adapted to descry vessels at the earliest moment." (St. John v. Paine et al., 10 Howard, 585; The *Genesee Chief v. Fitzhugh*, 12 Howard, 462; The *Schooner Catharine v. Dickenson et al.*, 17 Howard, 177; The *Europa*, 2 Eng. L. and Eq. Rep., 563 and 564; The *Diana*, 1 Rob., jun., 131; Pritchard's Admiralty Digest, p. 163, sec. 50, and note; *Steamboat New York v. Rea*, 18 Howard, 225; The *William K. Perrin v. The Louisiana*, Am. Law Reg., vol. 6, p. 427.)

2. The master and chief mate were in bed while the steamboat was running at a rapid rate in a locality much frequented by vessels, through an atmosphere so smoky that the character and course of the propeller could not be determined at the distance of half a mile.

3. The steamboat was greatly in fault in not diminishing her speed when she found herself in close proximity with another vessel, of whose character and course she was ignorant. (The *Rose*, 2 Rob., jun., pp. 2, 3; The *Virgil*, ib., 205;



*Chamberlain et al. v. Ward et al.*

The Birkenhead, 3 Rob., jun., 75; The Perth, 3 Haggard, 414, 417; The Rainbow, 11 Am. Law Jour., 332; Peck v. Sander-son, 17 How., 181; The Genesee Chief, 12 How., 463; The Northern Indiana, Judge Hall, Manuscript; The Steam-tug Sampson, Justice Grier, vol. 3, Am. Law Register, 340; Shute v. Goslee, Justice Campbell, ib., 475; The Europa, 2 Eng. Law and Eq., 559.) In the case of the New York and Virginia Steamship Company v. Calderwood et. al., (19 How. Rep., 241,) Mr. Justice Campbell says, (page 246,) "In the present instance, the steamer had notice that a vessel was before her, and was near her track, and, under the circum-stances, she was bound to take efficient measures to avoid the schooner."

4. Having neglected to "ease her engine," which would have been, to say the least, a proper precautionary measure, under the circumstances, the burden rests upon the Atlantic to show that the collision was not owing to that neglect, but would have equally happened if she had performed her duty. (Schooner Lion, Judge Sprague, 6 Law Reporter, 117; The Anita v. The Steamboat Anglo-Norman et. al., McCaleb, Judge Eastern Dist. of Louisiana, Newberry's Ad. Rep., 494.)

5. The steamboat committed an unpardonable fault when she threw her helm "*a-port*," and attempted to cross the bows of the propeller. In fact, the collision was brought about by this rash and unskilful manœuvre. (The London Packet, 2 Rob., jun., 213; The Emily, Blatchford's Rep., 236; The Rain-bow, 11 Am. Law Journal, 332; The Steam-tug Sampson, 3 Am. Law Register, 339; Steamer Ocean, 1 Naut. Mag., 355; Northern Indiana, Judge Hall, Manuscript; The James Watt, 2 Rob., jun., 270; The Friends, 4 Moore, 314; Pritchard's Ad. Digest, 171, note 98; The Steamer Oregon et. al. v. Rocca et. al., 18 How., 572.)

6. After the collision, the Atlantic was blamable in not having attempted to ascertain whether the Ogdensburgh re-quired assistance. (The Celt, 3 Haggard, 327.)

The following were the points made by the counsel for the appellees, which were sustained by numerous authorities:

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*Chamberlain et al. v. Ward et al.*

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1. Time and distance cannot be accurately estimated by witnesses.

2. The speed of the Atlantic was not illegal, and it was not her duty to slow at any moment before the collision.

The speed of the Atlantic was such as is universal in similar circumstances by steamers of her class and power, and there is nothing in the English or American decisions to establish a *rule of law* in hostility to her right so to run, &c.

We submit, then, it is clear there is no *rule of law* showing that on *such* a night, in the broad lake where it is thirty miles wide, we might not run as the *experts* all swear is the universal *usage*.

We submit that the great object to be accomplished by the law of Congress in relation to *lights*, by enabling *speed* to be kept up with *safety* at night, is *not* to be defeated. See the Supervising Engineers' Chart, saying, if *these rules* are followed, there is equal safety by night or by day.

But we have said *two* questions arise: *first*, whether our *general speed*, according to the usage of steamers of our class, was proper; and *second*, whether, after we came in *close proximity*, and saw the character and course of the Ogdensburgh, we should then have slowed our engine, and endeavored to stop.

As to this second proposition, we say:

It was not the duty of the Atlantic to abate her speed in the least, when the close proximity of the vessels enabled her to discover the true character of the Ogdensburgh.

Although we deem this a mere question of fact, dependent upon the proof of what is the practice and of what men of great experience deem prudent, still there are a few cases so peculiarly applicable to the circumstances of our own, where the reasons and illustrations of the judges are so illustrative of the policy of our own course, that we thought best to place them in our legal brief. The following case, decided a few months since in England, bears in its facts a more close resemblance to ours than is often found between adjudicated cases and that in judgment before the court. (3 Wm. Robinson, p. 191, The Rob Roy; 9 Eng. Ad., p. 191.)

3. The look-out of the Atlantic was in his proper place. But one was required. The decisions sustain both these positions.

But if we are mistaken in our position that the look-out of the Atlantic was sufficient, then the same fault is undeniably attributable to the Ogdensburgh.

4. It was the duty of the Ogdensburgh to port, and pass to the right, and not attempt to cross the bows of the Atlantic.

5. The Ogdensburgh being without the lights required by the act of Congress, March 3d, 1849, her owners, by its express provisions, are liable for all damages occasioned by the omission. (See 9 Stat. at L., p. 382, sec. 51; 4 Sandford, 492; 22 Law and Equity, 460; 5 How., 465; Conkling's Ad., 303.)

6. It is not sufficient to bring the Atlantic within the rule of admiralty, which divides the damages equally in cases of mutual fault, to show that we have not exercised the utmost care and diligence possible in the circumstances.

A reasonable prudence is all which the law demands.

7. Even were we to grant that the Ogdensburgh was to the north, on a N. E. by E. course, and that we were on a course of S. W. by W., and to the south of theirs, still, as we saw no lights but those of a sail vessel, and had, as a steamer, the right to select the side on which we would go, and to presume that she would keep her course, being a sail vessel, we were not in fault for porting our wheel, and crossing her bows. Had she been in fact what her lights indicated, our course was lawful; and in this case no collision would have occurred.

Mr. Justice CLIFFORD delivered the opinion of the court

This was a suit *in personam*, and comes before the court by appeal from the Circuit Court of the United States for the southern district of Ohio, sitting in admiralty. It was commenced by the present appellees, as owners of the steamer Atlantic, against the appellants, as owners of the propeller Ogdensburgh, and grew out of a collision which occurred on Lake Erie between those vessels on the 20th day of August, 1852, whereby the propeller received damage, and the steamer was run down and lost. Some change was made in the nature

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*Chamberlain et al. v. Ward et al.*

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and character of the proceeding after the suit was instituted, making it necessary that a brief explanation should be given, in order that the present state of the pleadings may not be misunderstood. According to the transcript, the original libel was filed in the clerk's office of the District Court on the 27th day of October, 1852, and on the same day a process of attachment against the propeller, and monition to her owners, was taken out, and was subsequently served, pursuant to its mandate, by attaching the vessel, publishing notice to those interested, and summoning the respondents. On the 11th day of November following, an amended libel was filed in court, setting forth more in detail the circumstances of the collision and the grounds of the claim as made by the libellants. As amended, however, the libel still retained in some of its aspects the form of a proceeding *in rem* against the vessel, and a suit *in personam* against her owners.

In the answer, which was not filed till after the process was served, the appellants, as claimants of the propeller and respondents in this suit, excepted to the form of the libel, alleging that the two modes of proceeding were improperly joined, and prayed that the libel should be dismissed on that account. At the hearing in the District Court, the exception of the respondents for a misjoinder was sustained, and thereupon the libellants, on motion for leave, were permitted to amend and change the proceeding to the form of a suit *in personam* against the appellants as owners of the propeller, and the cause was allowed to progress, and in that form of proceeding the parties were ultimately heard upon the merits of the controversy. Another explanation is also necessary, connected with the answer of the respondents, as without it the subsequent proceeding ~~25~~ the cause would appear to have been irregular, and certainly would be incomprehensible. On the 26th day of April, 1853, the parties entered into an agreement to the effect that the answer of the respondents in this suit should operate as a cross-libel for the damage sustained by the propeller, and that the claims of both parties to damage should be considered by the court in weighing the evidence, and be adjudicated upon in the final decree; and in order to facilitate the investi-

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*Chamberlain et al. v. Ward et al.*

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gation, it was admitted in the case that the damage sustained by the propeller amounted to the sum of three thousand dollars, and that the value of the steamer was seventy-five thousand dollars. Other interlocutory proceedings were had in the cause which it is not important to notice, and testimony was taken on both sides, and at the final hearing on the 10th day of May following a decree was entered, that the libel be dismissed with costs; and under the authority conferred by the agreement that the answer should operate as a cross-libel, it was further ordered, adjudged, and decreed, that the libellants pay to the respondents, within thirty days, the sum of three thousand dollars, with interest, as the damage which the propeller sustained by the collision.

From that decree the libellants appealed to the Circuit Court. Much additional testimony was taken in the Circuit Court, and after a full hearing on the 12th of November, 1856, upon the pleadings as modified, and the proofs adduced by the respective parties, it was ordered, adjudged, and decreed, that the decree of the District Court be in all things reversed, and a final decree was entered, to the effect that the damages occasioned by the collision, together with the costs in both courts, be equally divided, and that each party bear a moiety of the same; and that the respondents, pursuant to the admissions of the parties as to the amount of the damage, pay to the libellants the sum of thirty-six thousand dollars. Whereupon the parties respectively appealed to this court, and the appeals have been separately docketed in conformity to the agreement of the parties, that the answer of the respondents should operate as a cross-libel for the damage sustained by the propeller.

Some reference to the pleadings touching the merits of the controversy now becomes necessary, before we proceed to the consideration of the matters of fact in dispute between the parties in this suit.

According to the allegations of the libel, the steamer *Atlantic* was duly enrolled and licensed, and was regularly employed in transporting passengers and freight, making semi-weekly trips each way, to and from Detroit, in the State of Michigan, and Buffalo, in the State of New York. She left Buffalo at

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*Chamberlain et al. v. Ward et al.*

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the usual hour in the evening of the 19th of August, 1852, with freight and a large number of passengers on board, bound on her regular trip to the port of Detroit. And the libellants allege that she was a tight, strong vessel, and in every respect well manned, equipped and appointed for the voyage, with a full complement of officers and men; and that those to whom the duty properly belonged were at the time of the disaster on the look-out for the safety and protection of the vessel. They also allege that after leaving Buffalo she proceeded on her voyage in the usual route across the lake, with all her signal-lights displayed as required by law; that while she was so proceeding, at about half past two o'clock in the morning of the following day, and when she was off Long Point, on the Canada shore, the propeller Ogdensburgh, then being on her way from Cleveland to the entrance of the Welland canal, came upon the steamer, and with great force and violence ran into her, the bow of the propeller striking the larboard side of the steamer near the forward gangway, breaking and crushing by the force and violence of the collision into and through the guard and hull of the vessel, so that she filled with water and sunk, and became wholly lost to the libellants.

Other matters of fact, material to the issue, are also set forth in the libel, and among the number are the following: that the propeller, before and at the time of the collision, did not have burning, and properly displayed, the signal lights required by law; that she was not then proceeding in the usual route from Cleveland to the entrance of the canal, and that those in charge of her when she came in sight of the lights of the steamer neither stopped her engines, nor slackened her speed, nor altered her course, nor took any other precaution to prevent or avoid a collision; and the libellants aver that it was otherwise with those in charge of the steamer; that as soon as they perceived the lights of the propeller approaching, they put the wheel of the steamer first a-port, and then hard a-port, turning her course to the right, away from the propeller, as by law it was their duty to do, and that they made every effort in their power to avoid a collision; and, finally, that the persons in charge of the propeller, though they saw the lights of the

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*Chamberlain et al. v. Ward et al.*

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steamer at a great distance, and in ample time to have prevented the disaster, did not put the wheel of the propeller a-port, or turn their vessel to the right, away from the steamer, as they were bound to do; nor did they stop or slow the engine, or display lawful signal lights, but so negligently, improperly, and unskillfully navigated their vessel that she ran directly and almost at right angles into and against the steamer, and thereby occasioned the disaster. Many of the affirmative facts alleged in the libel are expressly controverted in the answer filed by the respondents. They deny that the steamer was a tight, strong vessel, or that she was well manned and appointed for the voyage; and they also deny that the proper persons were on the look-out for the protection and safety of the vessel, or that those in charge of the steamer took any precautionary measures to prevent the collision.

In addition to these denials they allege, as matter of defence, that the propeller, a vessel of three hundred and fifty-three tons burden, left Cleveland on the day preceding the disaster, at about twenty minutes past twelve o'clock, deeply laden, and proceeded on her voyage, by the way of Fairmount, towards Ogdensburgh, her place of destination, which was to be reached through the canal before mentioned; that about two o'clock the next morning, and when she was steering northeast by east, on her proper course to the entrance of the canal, the wind being light and the weather somewhat hazy, the watch on her deck discovered the light of a steamer from two to three points off her larboard bow, which was supposed to be three miles distant; that the propeller kept on her course, running at a speed of about seven miles an hour, until the mate, who had the watch, ascertaining that the light was fast approaching the propeller, gave the signal to slow, which was obeyed; and soon after, on discovering that the light was coming still nearer, signalled to stop; and then, finding that the vessels were likely to come in contact, he directed the engine to be reversed, and gave the order to back; but in spite of all these precautionary measures the collision ensued.

Respecting the immediate cause of the collision, the theory of the respondents is, that the steamer, if she had held her

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*Chamberlain et al. v. Ward et al.*

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course southwest by west, would have passed the propeller nearly a mile on her starboard quarter; and they accordingly allege, that by putting her helm a-port her course was turned to the right, so as to bring her across the bows of the propeller. And they also allege, in this connection, that the steamer was running with unabated speed, at the rate of fifteen miles an hour, when she fell with all her momentum upon the stem of the propeller, wrenching it out of its place, and carrying the propeller half round as she ran on her course.

And they finally allege that the persons in charge of the propeller, from the moment they first discovered the light of the steamer to the time of the collision, managed their vessel according to the most approved rules of navigation; and that the collision was wholly owing to the fault, neglect, and unskilfulness, of the officers and crew of the steamer, in changing her course across the path of the propeller, and in their culpable omission to stop the steamer, after it was found that such change of course increased the danger, by bringing the two vessels closer together. And, in accordance with the theory that the steamer was wholly in fault, they pray that their answer may be taken as a cross-libel in their behalf, to recover the damage sustained by the propeller, and that such sum may be decreed to them, by reason of the collision, as in justice they are entitled to receive.

Such is the substance of the pleadings, so far as respects the circumstances of the collision, and all the matters of fact to be determined by the court.

Since the suit was commenced, the parties have examined more than one hundred witnesses; and their testimony, as exhibited, fills nearly four hundred pages of the transcript. In that state of the case, a particular analysis of the testimony of each witness, and a comparison of their respective statements, will not be attempted, as its effect would be to extend the investigation beyond all reasonable limits, without any practical benefit to either party. All that can be done, under the circumstances, will be to state the material facts proved, and to refer to such brief portions of the evidence as seems to be necessary to confirm our conclusions. Conflicting testi-



mony we have endeavored to reconcile, where it was possible; and when not so, we have drawn our conclusions from the weight of the evidence and the probabilities of the case.

With these explanations, we will proceed to state the material facts, so far as respects the steamer *Atlantic*.

She left Buffalo between nine and ten o'clock in the evening of the day preceding the disaster, having on board, in addition to her freight, nearly five hundred passengers, of whom more than one hundred were lost. At the time of her departure, she was in every respect seaworthy, and was well manned and appointed for the voyage, with a competent master and a sufficient and competent crew. Steamers, on leaving Buffalo for Detroit, usually steer southwest by west; and the *Atlantic*, following her accustomed route, pursued that general course during the night, until she made Long Point light, on the Canada shore, when the officer in charge of her deck changed her course one-fourth of a point to the southward, in order to give the light a wider berth. When abreast of that light, and about two miles distant from it, the steamer resumed her former course, about southwest by west, and continued on her voyage, without any other change, until the second mate, who had charge of the deck, discovered two white lights three-fourths of a point off her larboard bow, when he ordered the wheelsman to port her helm, and the order was obeyed.

Nothing additional occurred during the voyage, of any importance in this investigation, up to the time those lights were discovered by the second mate. His watch, which commenced shortly after the steamer was outside, had not then closed, and of course he was properly in charge of the deck. He testifies, that at first he saw only one light, and then another, and that they appeared like glimmering stars, and at first view he was unable to determine whether they were stars or the lights of a vessel; but upon further observation he supposed they were the lights of a sail vessel, and accordingly gave the order to port the helm. That order was given while the officer who issued it was standing in the pilot-house, which was situated on the forward part of the hurricane deck, at the usual elevation, in steamers of that description, above the water-line of

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*Chamberlain et al. v. Ward et al.*

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the vessel. She was a first-class steamer, of eight hundred tons burden, and was moving through the water at the rate of sixteen miles an hour, and the officer in charge of the deck, and who gave the order to port the helm, was the only look-out stationed on any part of the vessel; and it is not pretended that either officer or seamen, other than the officer of the deck, had been assigned to that duty during the voyage.

Two other persons, the wheelsman and a passenger, were in the pilot-house with the second mate, both when he discovered the lights and when he gave the order to port the helm; and the evidence shows that he went there for a purpose connected with his duty as officer of the deck; and he testifies that he had not been inside more than two minutes when he first saw the light. After having given the order to port the helm, he immediately left the position where he had been standing, and went on to the top of the pilot-house, and then he says the signal lights of the Atlantic, which were properly displayed, and were burning brightly, shone on to the approaching vessel, and enabled him to see that she was a steamer, and that the two vessels were very close together. His own account of what followed shows conclusively that the knowledge he then for the first time obtained, as to the character of the approaching vessel, was too late to enable him to adopt the necessary precautions to avoid the impending peril. On seeing the propeller, and ascertaining the danger of his situation, arising from the closeness of her approach, he ordered the helm of the steamer hard a-port, and, without waiting to know whether the order was obeyed, put his hand on to the telegraph, with a view to give the signal to stop; but perceiving that the collision was almost certain, he omitted to signal, concluding that the only chance of safety was to rely upon the velocity of the steamer, and the operation of her helm under the order already given, which, it seems, was promptly obeyed. Precautionary measures could not then be effectually adopted, as the time and opportunity to render them available had passed, and the two vessels almost immediately came together, the propeller striking the larboard side of the steamer near the forward gangway, crushing through the guard and hull of the steamer, and

otherwise damaging her, so that before she had run a mile she filled with water and sunk in the lake. These facts are drawn from the testimony of the witnesses who were on the deck of the steamer or in her pilot-house, and are believed to be substantially correct, and to correspond with the events as they occurred. They all concur in saying that they did not see any signal lights on the propeller as she approached, and supposed she was a sail vessel till it was too late to stop the engine, and affirm most confidently, that if good signal lights had been shown, they would have seen them. Those shown by the steamer were seen by the mate of the propeller when the vessels were three miles apart, and several witnesses testify that such lights, if properly shown, as required by law, could be seen at the distance of four or five miles; and in view of the evidence as to the state of the weather and the character of the night, we have no doubt they might have been seen, if burning brightly, in ample time to have prevented the disaster. All the witnesses agree that the wind was light, and the surface of the lake smooth, and they generally admit that there was some mist or haze on the water; but assert in the most positive terms that it was starlight overhead, and no one pretends that it was unusually dark. Good signal lights, under such circumstances, if burning brightly, could readily be seen, notwithstanding the haze on the water, at a sufficient distance to enable steamers approaching each other to adopt every necessary precaution to avoid a collision.

Having stated the principal facts proved, as they appear to the court, so far as respects the steamer, we will now proceed to the examination of those of a corresponding character which relate to the propeller. More difficulty attends this branch of the inquiry, on account of the conflicting state of the testimony, and the consequent uncertainty in which the facts are involved. Some of the facts, however, are fully proved, and to those we will first invite attention. As alleged in the answer, the propeller left Cleveland, on the day preceding the disaster, on her downward trip from Chicago to Ogdensburgh, which was to be reached through the Welland canal. No doubt is entertained that she was a good strong vessel, and there is nothing

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*Chamberlain et al. v. Ward et al.*

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in the testimony to call in question either the competency of her master or the sufficiency of her crew. It appears, by the testimony of her master, that she left Cleveland about noon, and ran down opposite Grand river by daylight; that after arriving there she steered, for about an hour, east-northeast, and then turned to northeast by east till the vessels came together. This last statement, however, is obviously mere hearsay, as the watch of the mate commenced at twelve o'clock at night, and he continued in charge of the deck until half past two in the morning, when the collision occurred; and the master admits, what it is important to observe, that it was usual when they got down off Long Point, and found themselves out of the way, "to steer accordingly," by which we understand him to mean that it was usual, when they got down there, to regulate the course of the propeller with respect to the well-known position of Long Point, and perhaps with a view to make that light, in the further progress of the voyage, which is proved to be the most prominent light on the route. At twelve o'clock the mate took charge of the deck, and he says he kept the propeller on a course of east-northeast until two o'clock, and then hauled her off from the southern shore, to northeast by east, and that soon after he saw a light two points or two and a half points off her starboard bow. Could this statement of the mate, in regard to the course of the propeller, be regarded as correct, we should be obliged to acquit both vessels, upon the ground that the alleged collision never took place, as obviously it could not, assuming that the course of the steamer has been correctly ascertained. His testimony in this particular, therefore, must be considered as founded in mistake; and it is proper to remark that he is contradicted in so many particulars, and is proved to have made so many contradictory statements in respect to the circumstances of the collision, that we deem it unsafe to give full credence to his statements, especially in regard to such matters in controversy as obviously involve the vindication of his own conduct in the management of the vessel. Rejecting his statement as incredible, because inconsistent with the admitted and well-established facts in the case, we are left without any satisfactory testimony in the record

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*Chamberlain et al. v. Ward et al.*

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from which the precise course of the propeller, for one or two hours before the collision, can be ascertained with any reasonable degree of certainty.

Looking at the other facts and circumstances in the case, there is much reason to conclude that the inexperience and ignorance of the mate led him, in the early part of his watch, to adopt a route somewhat nearer to the southern shore than had been usual, until he got down off Long Point; and finding, on arriving there, that he was too far to the southward, he then changed the course of the propeller to the one she was pursuing when the lights of the steamer were first discovered; and this view of the case finds support in the fact proved by the master, that it was usual to correct any irregularity in the course at that stage of the voyage. That the propeller was south of the Atlantic when her mate discovered the signal lights of the latter vessel, is proved beyond all reasonable doubt, and is in effect admitted by the mate in that part of his testimony where he says that the bearing of her lights, when he first saw them, was two or two and a half points off the starboard bow of the propeller. Her course then was in an easterly direction, and it is equally well established that her white lights were first seen on the steamer, whose course was westerly off her larboard bow. Assuming these two facts to be true, of which there is no doubt whatever, and it necessarily follows that the propeller was south of the Atlantic, and such, it is believed, was the real fact. Both vessels were injured by the collision, and additional light is shed upon this inquiry by the evidence in the case as to the localities in the respective vessels where the damage was received. All, or nearly all, the damage received by the propeller was in her starboard bow, near the stem, and it was the larboard side of the steamer, near the forward gangway, that was so crushed and broken in as to cause her to fill with water and sink. These circumstances, taken in connection with the well-established fact that the mate of the propeller, who had charge of her deck, persistently maintained that he had a right to keep his course, and that it was the duty of the steamer to adopt the necessary precautions to keep out of the way, furnish strong grounds of

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*Chamberlain et al. v. Ward et al.*

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presumption that no considerable change was made by the propeller until the peril was impending and the collision inevitable. Any change of course, if made under such circumstances, whether to the starboard or larboard, would not constitute a compliance with the rules of navigation, because it would be too late to accomplish the purpose for which precautions are enjoined.

Much discussion also took place at the bar upon the question whether the propeller, at the time of the collision, had proper signal lights displayed, as required by law. On that point, the evidence shows that her signal lights were seasonably set and properly displayed at the usual hour, and were burning brightly throughout the early part of the night; and no doubt is entertained that they continued to burn, so as to answer the purpose for which they are required, till after twelve o'clock, when the watch of the mate commenced. It is, however, clearly proved that it was usual and necessary to clean and trim them, and perhaps supply them with additional oil, about the middle of the night; and the steward, who was assigned to that service, and whose duty it was to see that it was properly performed, testifies that her signal lights were neglected in that particular on the night of the collision, and, consequently, were burning so dimly when it occurred, that they could not be seen at a distance beyond twice the length of the vessel; and in confirmation of this statement, he says that, shortly after the vessels came in contact, he took down the signal lights of the propeller, by order of the master, and brushed off the crust from the wicks and trimmed them, and testifies positively that they were dim.

1. Our conclusions upon this state of the evidence will now be briefly stated, commencing with the propeller; and we find that she was in fault, because she did not have a competent and skilful officer in charge of her deck, and because it appears that his want of qualifications and unskilfulness contributed to the collision. Owners of vessels, and especially those who own and employ steamships, whether propellers or side-wheel steamers, must see to it that the master and other officers intrusted with their control and management are skilful and

competent to the discharge of their duties, as, in case of a disaster like the present, both the owners and the vessel are responsible for their acts, and must answer for the consequences of their want of skill and negligence; and this remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all the time they have charge of the deck. That the mate in this case was substantially without experience in navigating steamers, and utterly destitute of the requisite information to fit him to determine the proper courses of the voyage, are facts so fully proved that it is difficult to regard them as the proper subjects of dispute; and what is more, the master knew his unfitness when he started on the voyage, and stated, before the vessel left Cleveland, to the effect that he was afraid that he was going to be sick, and that he had no confidence in the mate. Some of the owners also distrusted his fitness when they employed him, and made an effort to engage another person in his stead; and one of them, after having heard of the disaster, expressed his regret that the person to whom he first applied had not taken his place. We forbear to pursue this branch of the subject, only remarking, in addition to what has already been stated, that the evidence to establish his unfitness and incompetency for the place is full and conclusive.

2. The propeller is also in fault because she did not have signal lights properly displayed, as required by law; and this conclusion is intended to apply to the entire period after the steamer came in sight, the weight of the testimony tending strongly to show that they were little better than if they had been actually extinguished. At all events, it is satisfactorily shown that they were burning so dimly as not to fulfil the purpose and object for which they are required. There is some conflict in the statements of the witnesses on this point; but the testimony of the steward, whose duty it was to repair them, and who, by the command of the master, attended to the service shortly after the collision, appears to be entitled to belief, and when considered in connection with the positive affirmations of the witnesses for the libellants, that they looked for signal lights on the propeller as she approached, and saw none, seems to be

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*Chamberlain et al. v. Ward et al.*

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decisive of the question. Signal lights are required by the act of Congress, in order that they may be seen by an approaching vessel in season to enable those in charge of her to ascertain and adopt the necessary precautions to prevent a collision with the vessel whose lights are so displayed; and when they are extinguished, or burning so dimly as not to fulfil the purpose and object for which they are required, they do not and cannot constitute a compliance with the act of Congress.

3. The propeller is also in fault, for the reason that the officer in charge of her deck neglected seasonably and effectually to change the course of the vessel, and persistently kept her on her course after he discovered the signal lights of the steamer, rendering it highly probable that it was this error, no less than the former, which contributed to the collision. Many circumstances tend to show that if he had adopted the usual precaution the disaster might have been avoided. Comment upon this proposition is unnecessary, as in its legal aspect it imputes to the propeller a palpable violation of the rules of navigation, and the theory of fact on which it rests is substantially supported by the testimony of all the witnesses on both vessels, and by no one more fully than by the mate of the propeller, who had charge of her deck. He admits that he saw the signal light of the steamer when she was three miles distant, and he expressly states that the propeller was kept precisely on her course, until he saw that the steamer was very near, and then he says he gave the signals to stop and back; and at the same time that he signalled to stop, he told the man at the wheel to put the helm hard a-starboard, and he says the order was obeyed.

Full damages are claimed by the libellants, not only on the ground that the evidence shows that the steamer was without fault, but upon the further ground that the propeller, under the circumstances of this case, is made liable by the fifth section of the act of the 3d of March, 1849, for all the loss or damage which the steamer sustained. A brief reference, however, to the provision referred to, will show that the construction cannot be supported. Steamboats and propellers navigating the lakes are required by that section to carry a trian-



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*Chamberlain et al. v. Ward et al.*

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gular light, shaded green on the starboard side, and red on the larboard side, with reflectors, and to be of a size to insure a good and sufficient light; and the owners of such vessels neglecting to comply with the regulation are declared liable to the injured party for all loss or damage resulting from such neglect. It is insisted by the libellants that the owners of the propeller, inasmuch as she did not show good and sufficient signal lights, are liable to them in this case, under a proper construction of that provision, for all the damage occasioned to the steamer by the collision. Such is not the language of the section, and we think the construction contended for would be both unwarranted and unreasonable. Owners of the vessels named in that section are made liable for the consequences resulting from their own acts, or from the acts of those intrusted with the control and management of their own vessel, and not for any damage resulting from the misconduct, incompetency, or negligence, of the master or owners of the other vessel. They are made liable for their own neglect, and not for the neglect of the other party. Failure to comply with the regulation, in case a collision ensues, is declared to be a fault, and the offending party is made responsible for all loss or damage resulting from the neglect; but it is not declared by that section, or by any other rule of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. Absence of signal lights in cases falling within the act of Congress renders the vessel liable to the extent already mentioned, but it does not confer any right upon the other vessel to disregard or violate the rules of navigation, or to neglect any reasonable and practicable precaution to avoid a collision, which the circumstances afford the means and opportunity to adopt. Steamers displaying proper signal lights are in that respect without fault, but they have other duties to perform to prevent collisions, besides complying with that requirement, and their obligation to perform such other duties remains unaffected by any thing contained in the provision under consideration. As an

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*Chamberlain et al. v. Ward et al.*

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illustration of our views upon the subject, we will suppose the case of two steamers approaching on intersecting lines. They are required by the act of Congress to show signal lights, in order that each may be seen by the other in time to adopt reasonable and necessary precautions to prevent a disaster like the present; and if one has such lights, and the other has not, yet if the one having such lights actually sees the other vessel as she approaches, in ample season to avoid the collision, and neglects to take any proper precaution to prevent it, and it ensues, it cannot be said in such a case that all the loss or damage resulted from the neglect of the vessel without such lights, as the collision might have been prevented; and, but for the negligence or perverseness of those in charge of the vessel showing lights, would never have occurred. We are not prepared to admit that a fair construction of the section referred to would absolve a party, under such circumstances, from pecuniary responsibility. What the judgment of the court would be in the case supposed it is not necessary to decide, and we only advert to it as an illustration to show that the construction of the act of Congress contended for cannot be sustained. All we mean to decide is, that the neglect of the propeller to show signal lights did not vary the obligations of the Atlantic to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision, as the circumstances in which she was placed gave her the opportunity to employ.

1. The Atlantic is also chargeable with fault, because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel after he discovered the white lights, which subsequently proved to be the white lights of the propeller. His excuse, that he supposed she was a sailing vessel, under the circumstances of the case, as shown in the evidence, is not satisfactory. When he first discovered those lights, the two vessels were at least a mile apart; and if it be true, as he states, that they appeared like glimmering stars, we are satisfied, from the evidence, that the distance must have been much greater, as is evident from the character of the night, and from the fact, which is fully

proved, that the red light of the steamer was seen on the propeller at the distance of three miles. Those white lights, though not the signal lights required by the act of Congress, were nevertheless sufficient to apprize the officer on the deck of the steamer that a vessel of some sort was approaching; and if he had performed his duty, the night being calm and the wind light, he might have seasonably ascertained that it was a propeller. They were large globe lamps, such as are usually shown by sail vessels, and were suspended in a similar manner, and the weight of the testimony clearly shows that they were burning brightly; and if so, they would hardly appear like glimmering stars at the distance of a mile, on a smooth sea, when at the same time the usual red lights carried by steamers were plainly visible at three times that distance. Two other persons were in the pilot-house with the second mate when he discovered those white lights, one of whom was a master mariner; and although he says they did not hold any conversation, there is much reason to conclude that his estimate of the time he remained there is somewhat short of the fact. Master mariners, as well as other seafaring men, are very apt to converse when they meet on the theatre of their favorite pursuit; and the statement that they remained together in the pilot-house, even for two minutes, without speaking, needs confirmation.

2. In the second place, the Atlantic is chargeable with fault, because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engine, so as to avoid a collision, after he discovered the white lights of the approaching vessel. Whether his neglect to adopt those precautions, or some one of them, arose from inattention or rashness, is immaterial, as, in either event, it was a culpable omission of duty, plainly required by the rules of navigation in that emergency, and one which the dictate of common prudence, as well as a proper regard for the safety of his passengers, should have prompted him to perform; and the owners of the steamer must answer for the consequences of his negligence. His first order, to port the helm, was not designed to change the course of the vessel to any considerable extent, and only had the effect to open the light of the other vessel half a point.

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*Chamberlain et al. v. Ward et al*

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This is admitted, and so is the more important fact that no other change of course was made until he gave the order hard a-port, which his own testimony shows was at the instant of collision, and not until all reasonable expectation of preventing it was gone. Nothing additional was done to avert the disaster; and the officer of the deck admits that the speed of the steamer was not slackened at any time throughout the entire period that elapsed after he saw the white lights of the approaching vessel.

On this ground, we think the steamer was clearly in fault, and that her owners are responsible for the consequences of the negligence or mismanagement of the officer in charge of the deck.

3. In the third place, the Atlantic was in fault, because she did not have a vigilant and sufficient look-out. No person, either officer or seaman, was assigned to that duty, except the second mate, who also had charge of the deck and the control and management of the vessel. According to his testimony, the officer of the deck was not expected to occupy any one particular place on the vessel; but was sometimes on the top of the promenade deck, either on the larboard or starboard side of the vessel—sometimes in the pilot-house, on the hurricane deck—and sometimes on the top of the pilot-house; and, in accordance with this practice, the wheelsman of his watch, who was called by the libellants, testifies that he saw him round on the deck, attending to his duties, during all the time he was at the wheel. Steamers navigating in the thoroughfares of commerce must have constant and vigilant look-outs stationed in proper places on the vessel, and charged with the duty for which look-outs are required, and they must be actually employed in the performance of the duty to which they are assigned. To constitute a compliance with the requirements of law, they must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty; and for a failure in either of those particulars, the vessel and her owners are responsible.

Look-outs stationed in positions where the view forward or on the side to which they are assigned is obstructed, either by

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*Chamberlain et al. v. Ward et al.*

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the lights, rigging, or spars of the vessel, do not constitute a compliance with the requirement of the law; and, in general, elevated portions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward deck, nearer the stem. Persons stationed on the forward deck are less likely to overlook small vessels, deeply laden, and more readily ascertain their exact course and movement. Ocean steamers usually have two look-outs in addition to the officer of the deck, and in general they are stationed one on the larboard and the other on the starboard side of the vessel, as far forward as possible, and during the time they are so engaged they have no other duties to perform; and no reason is perceived why any less precaution should be taken by first-class steamers on the lakes. Their speed is quite as great, and the navigation is no less exposed to the dangers arising from the prevalence of mist and fog, or from the ordinary darkness of the night; and the owners of vessels navigating on those waters are under the same obligations to provide for the safety and security of life and property as attaches to those who are engaged in navigating the seas.

Apply these principles to the present case, and it is obvious that the officer in charge of the Atlantic was not a sufficient look-out. He stood the watch of the master, who was below; and, as the officer of the watch, he had the charge of the deck and the control and management of the vessel; and in the midst of his varied duties it is scarcely possible that he could give his undivided attention to the special duty required of look-outs.

Not long before the white lights of the approaching vessel were discovered, he had occasion to go into the pilot-house, to look at the compass; and there is much ground to presume that the disaster is more attributable to that circumstance than any other in the case, except the absence of proper signal lights on the propeller.

We are of the opinion that it is a case of mutual fault, and that the decree of the Circuit Court, apportioning the damages, was correct.

The decree of the Circuit Court, therefore, is affirmed, without costs.

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*Ward et al. v. Chamberlain et al.*

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Mr. Justice DANIEL and Mr. Justice GRIER dissented.

Mr. Justice DANIEL :

In the case of the *Atlantic* and the *Ogdensburgh*, it is my opinion that the admiralty powers of the United States courts do not embrace such a case.

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**EDER B. WARD AND STEPHEN CLEMENT, SURVIVORS OF SAMUEL WARD, DECEASED, APPELLANTS, v. PHILO CHAMBERLAIN AND JOHN H. CRAWFORD, CLAIMANTS OF THE PROPELLER OGDENSBURGH.**

Where a libel was filed by the owners of a steamer against the owners of a propeller for a collision, and there was an agreement between the parties in the court below, that the answer of the respondents should operate as a cross-libel, the mode of proceeding does not meet the approval of this court, and ought not to be drawn into precedent. The respondents should file their cross-libel, take out process, and have it served in the usual way. The decision in the preceding case again affirmed.

THIS was an appeal from the Circuit Court of the United States for the southern district of Ohio.

It was in fact a cross-appeal in the preceding case, although there was no cross-libel filed. Being a branch of same case, it was argued by the same counsel.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is an appeal in admiralty from a decree of the Circuit Court of the United States for the southern district of Ohio. The appellants in this suit were the libellants in the case of *Chamberlain et al. v. Ward et al.*, decided at the present term, and the questions to be determined have respect to the same subject-matter which was in controversy in that case, and come before the court upon the same pleadings and testimony. In that case, *Ward et al.*, as owners of the steamer *Atlantic*, filed their libel in the District Court against *Chamberlain et al.*, as

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*Ward et al. v. Chamberlain et al.*

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owners of the propeller Ogdensburgh, to recover the damage sustained by the steamer in a collision which occurred between those vessels on the 20th day of August, 1852, while navigating on the waters of Lake Erie. After the process was served, Chamberlain et al. appeared and filed their answer to the libel. In the answer, after setting up several defences, they alleged, among other things not necessary to be noticed, that the collision was not occasioned by the negligence, inattention, or want of proper care and skill, on the part of the master or crew of the propeller, but wholly through the fault, neglect, and unskillfulness, of the master and crew of the steamer, and set forth the grounds on which those allegations were based, and prayed that their answer to the libel might also be taken as a cross-libel in their behalf against Ward et al., to recover the damage which the propeller sustained by the collision.

On the twenty-sixth day of April, 1853, the parties entered into an agreement, which is a part of this record, that the answer of the respondents should operate as a cross-libel, and that the claims of both parties should be considered by the court in weighing the evidence, and be adjudicated upon in the final decree. Afterwards, at the final hearing in the District Court, on the merits of the case, the libel was dismissed upon the ground that the steamer was wholly in fault; and, under the agreement of the parties that the answer should operate as a cross-libel, a decree was entered in favor of Chamberlain et al., for the amount of the damage occasioned to the propeller. Ward et al., as owners of the Atlantic, appealed to the Circuit Court, where the decree of the District Court dismissing the libel and awarding damages to the propeller, as upon a cross-libel, was in all things reversed. That reversal was made upon the ground that the collision was the result of mutual fault, and that the damages and costs ought to be equally divided. Injuries had been sustained by the propeller to the amount of three thousand dollars, and the agreed value of the steamer at the time of her loss was seventy-five thousand dollars, and accordingly a decree was entered in favor of Ward et al. for the sum of thirty-six thousand dollars, together with a moiety of the costs in both courts. From that decree

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*Ward et al. v. Chamberlain et al*

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Chamberlain et al. appealed to this court, and the appeal was regularly docketed, and the case has been heard and decided by the court, upon the libel, answer, and proofs, as exhibited in the transcript. At the same time, Ward et al., the present appellants, also appealed from so much of the decree of the Circuit Court as found the Atlantic in fault, and directed that the damages should be divided. They appealed as respondents in the cross-libel, and under the agreement before referred to, as sanctioned in the District Court, filed a separate copy of the record, and regularly docketed the appeal, as in the case of a cross-libel, the answer in the other record constituting the libel in this case.

We have been thus particular in adverting to these proceedings, in order that the relation which the respective parties bear to this controversy, and the state of the pleadings, may be fully and clearly understood, and for the purpose of remarking that they are unusual, and do not meet the approval of this court, and ought not to be drawn into precedent. Respondents in a pending libel have the right, in a proper case, to institute a cross-libel to recover damages against the libellants in the primary suit; but they should file their libel, take out process, and have it served in the usual way; and when that is done, the libellants in the first suit regularly become respondents in the cross-libel, and, as such, they must answer or stand the consequences of default. Regularity in pleading is both convenient and essential in judicial investigations, and such departures from the usual practice as are exhibited in this record ought not to receive countenance. This appeal was taken, and has been prosecuted upon the ground that the Circuit Court erred in coming to the conclusion that the Atlantic was in fault. That question we have already considered and decided in the other appeal, and the conclusions there stated, and the reasons for them, are applicable to this case. As before remarked, both appeals were taken from the same decree, and the questions presented for the decision of the court are in all respects the same, and depend upon the same testimony. In that case, the court held that the Atlantic was chargeable with fault upon three grounds.



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*White v. Vermont and Massachusetts Railroad Company.*

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1. Because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel after he discovered the white lights, which subsequently proved to be the white lights of the propeller.

2. That she was also in fault because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engines, after he discovered those lights, so as to prevent a collision.

3. That she was also in fault because she did not have a vigilant and sufficient look-out.

Our reasons for these conclusions are fully stated in the former case, and need not be repeated. Having already decided that the propeller also was in fault, the necessary result is, that the decision of the Circuit Court was correct.

The decree of the Circuit Court, therefore, is affirmed, without costs.

Mr. Justice DANIEL and Mr. Justice GRIER dissented.  
See dissent in the preceding case.

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**SELDEN F. WHITE, PLAINTIFF IN ERROR, v. THE VERMONT AND MASSACHUSETTS RAILROAD COMPANY.**

Bonds issued by a railroad company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the Circuit Court of the United States for Massachusetts.

The eleventh section of the judiciary act does not apply to such a case.

The usage and practice of railroad companies, and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments.

The later English authorities upon this point overruled.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Massachusetts.

The facts are stated in the opinion of the court.

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*White v. Vermont and Massachusetts Railroad Company.*

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It was submitted on printed arguments by *Mr. Parker* for the plaintiff in error, and *Mr. Hutchins* for the defendant.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The suit was brought in the court below by the plaintiff (*White*) against the company, upon several bonds issued by the same.

The case was presented to the court upon an agreed state of facts, and, among others, that the bonds in question were issued by the company, in regular course, and for a sufficient consideration; and that payment had been demanded and refused. Coupons for the accruing interest, previous to the maturity of the bonds, had been duly paid.

It was further agreed that bonds of this description, issued by the company, were sold in the market, and passed from hand to hand by delivery, at prices varying according to the state of the market; and that those in question were issued at or about their date, to a person a citizen of Massachusetts, and were payable in blank, no payee being inserted; that they came into the hands of the plaintiff through several intervening holders, in regular course; and that he then and since lived in the State of New Hampshire, and, before this suit was brought, filled up the blank by inserting "*Selden F. White, or order,*" the name of plaintiff, without the knowledge or consent of the defendants.

The court ruled that the suit could not be sustained, for want of jurisdiction.

The ground upon which this ruling below is sought to be maintained is, that these bonds were issued to citizens of Massachusetts; and as they could not be regarded as negotiable instruments, or, if negotiable, not payable to bearer, the plaintiff was disabled from suing in the Federal court, within the prohibition of the eleventh section of the judiciary act. (15 Pet. R., 125; 2 ib., 318; 8 How., 574; 8 ib., 441.)

In answer to this ground, we think it quite clear, on looking into the agreed state of facts, in connection with the bonds and

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*White v. Vermont and Massachusetts Railroad Company.*

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the mortgage given to secure their payment, that it was the intention of the company, by issuing the *bonds* in blank, to make them negotiable, and payable to the holder, as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended, by the blank, to leave the holder his option as to the form or character of negotiability, without restriction. If the utmost latitude, in this respect, was not intended, why leave the payee in blank when issuing the bonds, or why not fix the limit of negotiability, or negative it altogether? To adopt any other conclusion would seem to us to be unjust to the company, for then the blank would be wholly unmeaning; or if any, a meaning calculated, if not intended, to embarrass the title of the holder.

Assuming, then, that these bonds were intended to be made negotiable, we do not see the difficulty suggested in maintaining the suit in the Federal court; for, until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order. At that time he was a citizen of New Hampshire, and, therefore, competent to bring the suit in the court below.

As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country, dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question. (*Morris Canal Co. v. Fisher*, 1 Stockton, 667, 699; *Delafield v. State of Illinois*, 2 Hill N. Y., 177; 8 Paige Ch. R., 527, S. C.; *Mich. Bank v. N. Y. and N. H. R. R. Co.*, 8 Kern R., 625; *Carr v. Le Fevre*, 27 Penn. R., 418; *Craig v. The City of Vicksburg*, 31 Miss. R., 216; *Chester W. Chapin v. The Vt. and Mass. R. R. Co.*, decided Sept. 7, 1857, in Sup. C. of Mass.)

Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and

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*White v. Vermont and Massachusetts Railroad Company.*

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as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years, large masses of them have gone into general circulation, and in which capitalists have invested their money; and it is not too much to say, that a great share of the confidence they have acquired, as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand, as the protection afforded to the *bona fide* holder.

It is true that in England the law is, that a bond delivered in blank, as it respects the payee, is void, and the blank incapable of being filled up by the holder, either upon an implied or express parol authority from the maker. This is maintained upon the principle that the authority of an agent to make a deed for another must be by deed; and, also, that to admit the parol authority to fill up the blank would, in effect, make a bond transferable and negotiable, like a bill of exchange or exchequer bill. (Hibble *White v. McMorine*, 6 Mees. and Welsb., p. 200; and *Enthoven v. Hoyle et al.*, in the Exch., 9 Eng. L. and Eq. R., 434.)

The law had been otherwise held by Lord Mansfield, in the case of *Texira v. Evans*, cited in *Masten v. Miller*, (1 Anstruther, 228;) but was distinctly overruled by Park, B., in delivering the opinion of the court in the case first above cited, and the opinion reaffirmed by him still more strongly in the second case.

Courts of the highest authority in this country have followed Lord Mansfield, and have not hesitated to meet the fears expressed by Park, B., (that the effect would be to make bonds negotiable,) by admitting the consequence. Chief Justice Marshall, in the case of the *United States v. Nelson & Myers*, (2 Brock. R., 64,) hesitated to reach this conclusion, but expressed a strong belief that, at some future day, it would be by this court.

We think, for the reasons above given, the ruling of the court below cannot be upheld, and that the judgment should be reversed, with a *venire de novo*, &c.

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*Walker v. Smith.*

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JOHN M. WALKER, APPELLANT, *v.* JONATHAN B. H. SMITH.

By an act of Congress, passed on the 3d of March, 1835, (4 Stat. at L., 771,) a certain quantity of land was appropriated to the satisfaction of Virginia military land warrants, with a proviso that if the land was not enough to satisfy the warrants, a distribution should be made *pro rata*, in full satisfaction of the warrants. Under it a dividend of ninety per cent. was made.

In 1852 (10 Stat. at L., 143) another act was passed, providing for the deficiency of ten per cent., and directing the Secretary of the Interior to issue land scrip in favor of the "present proprietors" of any warrant thus surrendered.

A bill in chancery for an injunction to prevent the Secretary from issuing the scrip to one of two claimants cannot be sustained. The Secretary must decide, and then it becomes a chose in action, upon which a court can act.

Moreover, in this case the complainant has not made out such a case as to entitle him to relief.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia.

The facts are stated in the opinion of the court.

It was argued by *Mr. Chilton* and *Mr. Davidge* for the appellant, and by *Mr. Carlisle* for the defendant, on a brief by *Mr. Badger* and *Mr. Carlisle*.

Mr. Justice GRIER delivered the opinion of the court.

The purpose of this bill is to obtain an injunction to prevent the issuing of certain scrip to appellee by the Land Office, and to have cancelled the assignment under which the appellee had, by the officers of Government, been adjudged entitled to the scrip.

This bill was properly dismissed by the court below, as a brief statement of the case will show. The act of Congress of 3d March, 1835, made a further and apparently final appropriation of six hundred and fifty thousand acres, to be applied to the satisfaction of Virginia military land warrants. It provided that "no scrip should be issued thereon until the 1st of September following, and that warrants should be received in the General Land Office till that day; and immediately thereafter, if the amount filed exceeded six hundred and fifty thousand

## Walker v. Scott.

where the Commissioners of the Land Office should appraise the said six hundred and fifty thousand acres, the warrants which said then is in the *total satisfaction thereof*.

The appraisement was sufficient to pay ninety per cent. of the warrants tendered.

William S. Scott, an attorney for the heirs of General Charles Lee, filed a warrant in their names for fifteen thousand acres: which was surrendered and satisfied by the issue of land scrip for thirteen thousand five hundred acres, being ten per cent. of the thousand five hundred acres less than the whole amount called for in the face of the warrants.

The warrants were therefore fully satisfied: and being surrendered were no longer evidence of any right of property. But it seems that notwithstanding this surrender and satisfaction there was a sort of lingering hope or expectation that some time hereafter Congress by continued importunity, might be prevailed upon to make some further grant of land to satisfy the balance of equity which was supposed to remain, after the warrants had surrendered their warrants and accepted the satisfaction tendered.

On the 30th March, 1837, Scott signed an instrument in form of a power of attorney, which, after reciting that he had sold to Walker, the complainant, the warrants, and delivered him the scrip issued in lieu thereof, stated as follows: "Now, the object of this power of attorney is to secure the said Walker the said ten per cent. of warrants unsatisfied, or any and every equivalent that may be at any time given in lieu thereof," &c.

On the 18th of January, 1838, Scott conveys by indenture, in consideration of seven hundred and fifty dollars, and with warranty, the Lee warrants, on which he alleges there is "still due one thousand five hundred acres" to defendant. At this time the records of the Land Office contained no evidence of the prior assignment (if such it can be called) to Walker; and a clerk in the office endorsed on the respondent's deed as follows: "William S. Scott, the party grantor of the within, has full authority on file to sell the warrants and appoint a substitute; and in the event Congress makes up the *ten per cent.*, the scrip to be issued will be delivered to Mr. Smith."

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*Walker v. Smith.*

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Thus the matter stood for fourteen years, when at length, on the 31st of August, 1852, Congress passed an act, which authorized an issue of land scrip in favor of the *present proprietors* of any outstanding military land warrants, &c. This scrip is to be issued by the Secretary of the Interior, who is to make the necessary inquiries, and "be satisfied by a revision of the proof, or by additional testimony," &c.

It seems that this act has been construed to include not only unsatisfied warrants, but the ten per cent. not given on the satisfied and surrendered warrants. It is a liberal construction of the statute, and so far as it extends to the scrip in question, it is a simple gratuity. The Secretary is made the agent for its distribution. It is his duty to ascertain the parties *entitled* to it, if any person can be said to have a title to a gift before it is received. When he issues the scrip, it then becomes a "chose in action," capable of being dealt with as property by courts of justice, but not till then. The question, as to who may be considered as the "*present proprietor*" of these surrendered and satisfied warrants, must be decided by him in the first instance by the rules, customs, and practice of the Land Office. Before the act of Congress, this right was too subtle (being no more than the remote expectation of a gift) to be dealt with by courts, and the act of Congress has not conferred on them the distribution of their bounty. Besides, if an injunction was issued to hinder the defendant from receiving the scrip which the Land Office has concluded to give him, this would confer no title on the complainant.

Whether, after the Land Office have issued the scrip to a claimant, another person alleging fraud or misrepresentation, and claiming himself to be the "proprietor" intended by the act, might not obtain the interference of the courts, to obtain a transfer of the scrip to himself, is a question not presented in this case.

But assuming that the court would undertake to decide as to the respective right of these claimants, treating their claims as tangible equities, the complainant has not made out such a case as would entitle him to relief. His power of attorney (or whatever it may be called) mentions no consideration paid

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*Barber v. Barber.*

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The answer of defendants, which is responsive to the bill, (which avers a purchase at market price,) denies the payment of any consideration whatever, and none has been proved. The defendant has paid a large and valuable consideration without any notice of the plaintiff's claim, has made his proofs, has had the decision of the Land Office in his favor. He has obtained an advantage of which a court of equity will not deprive him under the circumstances.

The judgment of the court below is affirmed with cost.

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**HIRAM BARBER, APPELLANT, v. HULDAH A. BARBER, BY HER  
NEXT FRIEND, GEORGE CRONKHITE.**

This court disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to a divorce *a vinculo*, or to one from bed and board.

But where a court of competent jurisdiction in New York decreed a divorce *a mensa et thoro* between man and wife, allowing alimony to the latter, and the husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony, or leaving any estate of any kind out of which it could be paid, the wife can sue by her next friend in a court of the United States, having equity jurisdiction, to recover the amount of alimony decreed by the State court.

A divorce *a vinculo*, obtained in Wisconsin without a disclosure of the circumstances of the divorce case in New York, and upon the allegation by the husband that the wife had wilfully abandoned him, cannot release the husband there and everywhere else from his liability to the decree made against him in New York, upon that decree being carried into judgment in a court of another State of this Union or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile, differing from that which he had in New York when the decree was made there against him.

The cases in England and in the United States examined, in which a wife may sue her husband by her next friend.

A court of chancery in England will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court, and the principal reason for its exercise is equally applicable to courts of equity in the United States. The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our State courts



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*Barber v. Barber.*

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having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given by the ecclesiastical court of England.

This court has heretofore decided, and now reaffirms, that in order to bar the jurisdiction of the courts of the United States in equity, the remedy at law must be as practical and efficacious to the ends of justice and its prompt administration as the remedy in equity; and it is no objection to such equity jurisdiction that there is a remedy under the local law.

After the divorce *a mensa et thoro* in New York, and the removal of the husband to Wisconsin, the domicile of the wife did not follow that of the husband, but remained unchanged in New York. The jurisdiction of the United States court therefore attached as it respected the different citizenship of the parties.

The American and English authorities upon this point examined.

A wife under a judicial sentence of separation from bed and board is entitled to make a domicile for herself different from that of her husband; and she may, by her next friend, sue her husband for alimony which he had been decreed to pay as an incident to such divorce, or when it has been given after such a decree by a supplemental bill.

The equity side of the court was the appropriate tribunal before which she was to sue; and the District Court of the United States in the State of Wisconsin had jurisdiction over the case.

THIS was an appeal from the the District Court of the United States for the district of Wisconsin.

The facts in the case are stated in the opinion of the court.

It was argued by *Mr. Doolittle* for the appellant upon a brief filed by *Mr. Billingham* and *Mr. Doolittle*, and by *Mr. Brown* upon a printed argument for the appellee.

The reporter would give these arguments *in extenso*, but for the circumstance that the points in the case are thoroughly examined in the opinion of the court and in the dissenting opinion of Mr. Justice Daniel.

Mr. Justice WAYNE delivered the opinion of the court.

We regard this as a suit for a wife brought on the equity side of the District Court of the United States for the district of Wisconsin, by her next friend, George Cronkhite, a citizen of the State of New York, against Hiram Barber, a citizen of the State of Wisconsin, to give the same validity to a judgment

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*Barber v. Barber.*

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in that State which it has in the State of New York against the defendant for the payment of alimony to his wife, who has been divorced from him *a mensa et thoro*, with an allowance of alimony by a court, which had, when the decree was made, jurisdiction over the parties and the subject-matter.

We shall not have occasion to comment upon the relations of husband and wife in her uninterrupted coverture, nor will we discuss the general rights, obligations, or disabilities, of either, when they have been separated by a divorce *a mensa et thoro*.

Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.

The record raises these inquiries: Whether a wife divorced *a mensa et thoro* can acquire another domiciliation in a State of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equity jurisdiction, to recover from him alimony due, and which he refuses to make any arrangement to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case.

We will first direct our attention to the circumstances of the case, and will give them from the bill and answer, and from the testimony in the record.

Hiram Barber and Huldah Adeline Barber were married in the State of New York, in the year 1840, where his domicil then was, and continued to be until he left it for Wisconsin, which was soon after a decree had been given for a divorce *a mensa et thoro* between them, with an allowance of alimony to be paid by him. Her application for such a divorce was made by Cronkhite, her next friend, in the court of chancery for

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*Barber v. Barber.*

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the fourth district of the State of New York, that court having jurisdiction of the subject-matter and over the parties.

The defendant appeared and resisted the application. The cause was heard on the pleadings and proofs. It resulted in a declaration by the chancellor that the defendant had been guilty of cruel and inhuman treatment of his wife, and of such conduct towards her as to render it unsafe and improper for her to cohabit with him; and that he had abandoned, neglected, and refused to provide for her. And it therefore decreed that the complainant and defendant be separated from bed and board forever; provided, however, that they might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged; and that neither of the said parties shall be at liberty to marry any other person during the lifetime of the other party. The court then referred the cause to a master, to ascertain and report what should be allowed and to be paid by the defendant, or out of his estate, to Mrs. Barber, for her suitable support and maintenance. In pursuance of this decretal order and reference, the master made a report. The defendant filed exceptions to it. The cause was regularly brought to a hearing upon the defendant's exceptions. They were overruled, and a final decree was made in the cause. The language of the decree is, that the exceptions are overruled, and that the report of the master is absolutely confirmed. That for the suitable support and maintenance of Mrs. Barber, there should be allowed and paid to her by the defendant, or out of his estate, in quarterly instalments, the annual sum of three hundred and sixty dollars in each and every year; and that as it appeared he had not given to her any support in the interval between the filing of the bill in her behalf and the rendition of the decree, that the defendant should pay to her three hundred and sixty dollars a year in quarterly payments from the 1st day of July, 1844, that being the day when the bill was filed; and it was decreed that the sum of nine hundred and sixty dollars, being the alimony retrospectively due, should be paid forthwith by the defendant, and that the complainant should have execution therefor. It was further ordered, that the permanent alimony allowed and to become due after the

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*Barber v. Barber.*

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1st of March, 1847, to which day alimony is above computed, should be paid by the defendant in quarterly payments on the 1st days of March, June, September, and December, in each year during the life of Mrs. Barber; and in case of its not being so paid, that the quarterly payments should bear interest as they respectively became due, and that execution might issue therefor *toties quoties*. The court then decreed that the permanent alimony allowed to Mrs. Barber was vested in her for her own and separate use, and as her own and separate estate, with full power to invest the same in a trustee or trustees, as she might think proper to appoint, with the power to dispose of the same by will or otherwise, from time to time during her life, or at her death, or either, as she may think proper, free from any control, claim, or interposition of the defendant. The said decree, with a taxed bill of costs in the suit, was signed and enrolled according to the form of the statute in such cases made and provided in the State of New York.

It is upon a transcript of all the papers in that suit, authenticated as the law requires it to be done, that the suit now before us was brought in the District Court of the United States for the district of Wisconsin.

The complainants aver in their bill that they are citizens of the State of New York, and that the defendant is a citizen of the State of Wisconsin. They then set out the proceedings of the court in New York, divorcing Mr. and Mrs. Barber from bed and board, with especial reference to the decree and the entire record of that suit, charging the defendant with not having paid any part of the alimony adjudged to Mrs. Barber; and that there was then due to her on that account the sum of four thousand two hundred and forty-two dollars and fifteen cents, with interest at seven per cent., that being the legal rate in the State of New York. The rest of the bill it is not necessary to state more particularly, than that it is a recital of a suit which had been brought upon the common-law side of the District Court of the United States for the county of Milwaukee, in the Territory of Wisconsin, for the amount of alimony due by the defendant; to the declaration in which he filed a demurrer, upon which a judgment was rendered in

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*Barber v. Barber.*

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his favor, which was afterwards affirmed in the Supreme Court of the State, for the reason that the remedy for the recovery of alimony was in a court of chancery, and not at law. To this bill also the defendant demurred, on account of the case not being within the ordinary jurisdiction of a court of chancery, that the relief sought could only be had in the court of chancery in the State of New York, and that it did not appear that the complainants had exhausted the remedy which they had in New York. This demurrer was overruled, and the defendant was ordered to answer. He did so. He admits in his answer the legality and locality of his marriage with Mrs. Barber; the jurisdiction of the court in the divorce case; that a divorce had been decreed between them from bed and board, after contestation; and that by that decree he was subjected to the payment of alimony to the extent and in the way it is claimed in the bill he was then answering. He admits that he left the State of New York without having paid any part of it, or having made any arrangement to do so; alleging, however, that he had left real estate in New York, upon which no proceedings had been taken to make it liable to the decree against him for alimony. And he then goes on to state, that on the 19th day of April, 1852, he had filed his bill in the Circuit Court of the county of Dodge, in the State of Wisconsin, against Mrs. Barber, she then being his wife, to obtain a dissolution of the marriage contract between them, and that their marriage had been dissolved by a decree of that court, which is on record in the same. And he adds, that his wife by that decree became a *feme sole*; and being so, she could not sue by her next friend, and that her remedy was in a court of law. To this answer a general replication was filed. The cause was carried to a hearing upon the pleadings and proofs, and a decree was made, adjudging that five thousand nine hundred and thirty-six dollars and eighty cents is due from the defendant upon the alimony sued for, for principal and interest, to and prior to the time of filing the bill in this cause, and that the defendant should pay it, for the sole and separate support and maintenance of Mrs. Barber, together with the costs, to be taxed within ten days; and in default thereof, that execution should issue for the same.

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*Barber v. Barber.*

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It appears, from the testimony in the cause, that the defendant left the State of New York in a short time after the decree for the divorce and for alimony had been rendered, for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony due, or leaving any estate of any kind out of which it could be paid; for he gave no proof of any kind that he had real estate in the State of New York in support of that allegation in his answer.

It also appears, from the record, that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce case in New York; and that, contrary to the truth, verified by that record, he asks for the divorce on account of his wife having wilfully abandoned him. It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New York, upon that decree being carried into judgment in a court of another State of this Union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him.

The questions made by the bill and the answer, and by the arguments of counsel, we will state in the form of an inquiry. They are as follows: Whether a wife divorced *a mensa et thoro* may not have a domiciliation in a State of this Union different from that of her husband in another State, to enable her to sue him there by her next friend, in equity, in a court of the United States, to carry into judgment a decree which has been made against him for alimony by a court having jurisdiction of the parties and the subject-matter of divorce?

In the consideration of these questions, we must not allow ourselves to be misled by the general rule which prevails in England, that a suit cannot be maintained at law by a *feme*

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*Barber v. Barber.*

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*covert*, and that, notwithstanding a divorce *a mensa et thoro*, a wife cannot sue or be sued in a court of law; for in England she may in several cases maintain a suit in her own name as a *feme sole*, both at law and in equity. They are exceptions to the general rule, or *privileged cases*, under certain circumstances, where it cannot be presumed, from his own acts, that the husband's control of his wife is continued, and where she has been deprived of his protection to represent with her her rights and interests in a suit at law, or in one in equity. The cases mentioned in the books where a *feme covert* may sue as a *feme sole* are: When her husband is banished, or has abjured the realm, or has been transported for felony; where the husband is an alien enemy, and his wife is domiciled in the realm; where the husband is an alien domiciled abroad, and has never been in the realm; or where he has voluntarily abandoned her, and is under a disability to return; so where the husband has deserted the wife in a foreign country, and she goes to England and maintains herself as a *feme sole*; where the husband, in a foreign State, compels his wife to leave him for another political jurisdiction, and she maintains herself there as a *feme sole*.

Cases have been decided in Massachusetts in conformity with the English cases. There are cases in England which have gone much further, but we do not cite them, preferring only to mention such instances as have not been questioned by subsequent cases in England or in the United States. (See Story's Equity Pleading, 6th edition, sec. 61, pp. 59, 60, and the cases cited in the notes.)

Except in such cases, a *feme covert* cannot sue at law, unless it be jointly with her husband, for she is deemed to be under the protection of her husband, and a suit respecting her rights must be with the assent and co-operation of her husband. (Mitf. Equity Pl., by Jeremy, 28; Edwards on Parties in Equity, 144, 153; Calvert on Parties, ch. 3, sec. 21, pp. 265, 274; 6 How.)

In the case of *Burr v. Heath*, (6 How. S. C. R., 228,) this court said, without any reference to the law of Louisiana: "That the general rule was, when the wife complains of her husband, and asks relief against him, she must use the name

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*Barber v. Barber.*

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of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court. It is sanctioned in Story's Equity Pleading, and by Fonblanque. The modern practice in England has adopted a different course, by uniting the name of the wife with a person other than her husband, in certain cases."

There are also exceptions in equity, which are wholly unknown at law. Thus, if a married woman claims some right in opposition to the rights claimed by the husband, and it becomes proper to vindicate her rights against her husband, she cannot maintain a suit against him at law; but in equity she may do so, and against all others who may be proper or necessary parties. But it must be done under the protection of some other person who acts as her next friend, and the bill is accordingly exhibited in her name by such next friend. (Story's Equity Pl., 6th ed., sec. 61, p. 61.) It is also said, in the same work, to be our constant experience, that the husband may sue the wife, or the wife the husband, in equity, notwithstanding neither of them can sue the other at law. (*Cannel v. Buckle*, 2 P. Will., 243, 244; *Ex parte Strangeways*, 3 Ark., 478; *Fonblanque Eq.*, B. 1, ch. 2, sec. 6, note N; *Brooks v. Brooks*, Pre. Ch., 24; *Mitford Pl.*, by Jeremy, 28.) These citations have been made to show the large jurisdiction which a court of equity has to secure the rights of married women, when it may be necessary to exert it with the assistance of the husband, or when he improperly interferes with them, so as to make it necessary for the wife to defend herself against his unwarranted claims to her property. The result of that jurisdiction now is, that the wife may, in all such instances, sue her husband by her next friend.

There is, too, another ground of jurisdiction in equity, just as certainly established as that is of which we have just spoken. It comprehends the case before us. It is, that courts of equity will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England. Such a jurisdiction is ancient there, and the principal reason



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*Barber v. Barber.*

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for its exercise is equally applicable to the courts of equity in the United States. It is, that when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony. (*Shaftoe v. Shaftoe*, 7 Vesey, 171; *Dawson v. Dawson*, 7 Ves., 173; *Haffey v. Haffey*, 14 Ves., 261; *Angier v. Angier*, Pre. Ch., 497; *Cooper's Eq. P.*, ch. 3, pp. 149, 150; *Coglan v. Coglan*, 1 Ves., p. 194; *Street v. Street*, 1 Turn. and Tapel, 322.)

The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the States have jurisdiction.

We observe, in confirmation of what has just been said, that the jurisdiction of the courts of the United States is derived from the Constitution, and from legislation in conformity with it. The first limitation by the latter upon the jurisdiction of the equity courts of the United States is, that no suit can be sustained in them, where a plain, adequate, and complete remedy may be had at law. The court has said: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficacious to the ends of justice, and its prompt administration, as the remedy in equity. (*Boyce's Ex'x v. Grundy*, 3 Peters, 210; *United States v. Row*

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*Barber v. Barber.*

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land, 4 Wh., 108; Osborn and the United States Bank, 9 Wh., 841, 842.) It is no objection to equity jurisdiction in the courts of the United States, that there is a remedy under the local law, for the equity jurisdiction of the Federal courts is the same in all of the States, and is not affected by the existence or non-existence of an equity jurisdiction in the State tribunals. It is the same in nature and extent as the jurisdiction of England, whence it is derived." (*Livingston v. Story*, 9 Peters, 632.) Such a suit for the enforcement of a decree for alimony as that before us is not an exception, unless the court has not jurisdiction over the parties, and the amount be not such as is required to bring it into this court by appeal.

We proceed to show that it has jurisdiction. The Constitution requires, to give the courts of the United States jurisdiction, that the litigants to a suit should "be citizens of different States." The objection in this case is, that the complainant does not stand in that relation to her husband, the defendant; in other words, it is a denial of a wife's right, who has been divorced *a mensa et thoro*, to acquire for herself a domiciliation in a State of this Union different from that of her husband in another State, to entitle her to sue him there by her next friend, in a court of the United States having equity jurisdiction, to recover from him alimony which he has been adjudged to pay to her by a court which had jurisdiction over the parties and the subject-matter of divorce, where the decree was rendered.

We have already shown, by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and by cases decided by this court; that the jurisdiction of the courts of equity of the United States is the same as that of England, whence it is derived. On that score, alone, the jurisdiction of the court in the case before us cannot be successfully denied.

But it was urged by the learned counsel who argued this cause for the defendant, that husband and wife, although allowed to live separately under a decree of separation *a mensa et thoro*, made by a State court having competent jurisdiction, are still so far one person, while the married relation con-

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*Barber v. Barber.*

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tinues to exist, that they cannot become at the same time citizens of different States, within the meaning of the Federal Constitution, and therefore the court below had no jurisdiction. It was also said, for the purpose of bringing suits for divorces, they may acquire separate residences in fact; but this is an exception founded in necessity only, and that the legal domicile of the wife, until the marriage be dissolved, is the domicile of the husband, and is changed with a change of his domicile.

Such, however, are not the views which have been taken in Europe generally, by its jurists, of the domicile of a wife divorced *a mensa et thoro*. They are contrary, too, to the generally-received doctrine in England and the United States upon the point.

In England it has been decided, that where the husband and wife are living apart, under a judicial sentence of separation, that the domicile of the husband is not the domicile of the wife (English Law and Equity Reports, 9 vol., 598; 2 Robertson, 545.) When Mr. Philemore wrote his treatise upon the law of domicile, he said he was not aware of any decided case upon the question of the domicile of a wife divorced *a mensa et thoro*, but there can be little doubt, that in England, as in France, it would not be that of her husband, but the one chosen for herself after the divorce. In support of his opinion, he cites Pothier's *Introd. aux Coutume*, p. 4; Mercadie in his *Commentary upon the French Code*, vol. 1, p. 287; the French Code, tit. 111, art. 108; the Code Civile of Sardinia; and Cocher's *Argument in the Duchess of Holsten's case*, *Ouvres*, 1, 2, p. 223.

Mr. Bishop, in his *Commentaries on the Law of Marriage and Divorce*, has a passage so appropriate to the point we are discussing, that we will extract it entire. It is of the more value, too, because it comprehends the opinions entertained by eminent American jurists and judges in respect to the domicile of a wife divorced *a mensa et thoro*. He says, in discussing the jurisdiction of courts where parties sought a divorce abroad for causes which would have been insufficient at home, that "it was necessary to settle a preliminary question, namely, whether for the purpose of a divorce suit the husband and wife can have separate domicils; that the general doctrine is familiar, that

*Barber v. Barber.*

the domicile of the wife is that of the husband. But it will probably be found, on examination, that the doctrine rests upon the legal duty of the wife to follow and dwell with the husband wherever he goes.

"If he commits an offence which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, she must establish a domicile of her own, separate from her husband, though it may be, or not, in the same judicial locality as his. Courts, however, may decline to recognise such domicile in a collateral proceeding—that is, a proceeding other than a suit for a divorce. But where the wife is plaintiff in a divorce suit, it is the burden of her application, that she is entitled, through the misconduct of her husband, to a separate domicile. So *when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband.*" (Section 728.)

Chief Justice Shaw says, in *Harlean v. Harlean*, (14 Peck, 181, 185,) the law will recognise a wife as having a separate existence and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, *or so modified* as to establish separate interests, and especially a separate domicile and home. Otherwise the parties, in this respect, would stand upon a very unequal footing, it being in the power of the husband to change his domicile at will, but not in that of the wife.

The cases which were cited against the right of a wife, divorced from bed and board, to choose for herself a domicile, do not apply. (*Donegal v. Donegal*, in 1 Addam's Ecclesiastical Rep., pp. 8, 19.) That of *Shachell v. Shachell*, cited in *Whitcomb v. Whitcomb*, (9 Curteis Ecclesiastical Rep., p. 352,) are decisions upon the domicile of the wife, when living apart from her husband by *their mutual agreement*, but not under decrees divorcing the wife from the bed and board of the husband. The leading case under the same circumstances is that

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*Barber v. Barber.*

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of *Warrender v. Warrender*, (9 Bligh., 108, 104.) In that case, Lord Brougham makes the fact that the husband and wife were living apart by agreement, and not by a sentence of divorce, the foundation of the judgment. The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers, and places her in a situation to sue him for a divorce *a mensa et thoro*, and to ask the court having jurisdiction of her suit to allow her from her husband's means, by way of alimony, a suitable maintenance and support. When that has been done, it becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him wherever he may be found, or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to *carry the decree into a judgment there with the same effect that it has in the State in which the decree was given.* Alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is. When it is not paid, the wife can sue her husband for it in a court of equity, as an incident of that condition which gave to her the right to sue him, by her next friend, for a divorce.

It was decided in the State of Massachusetts, as early as the year 1800, that there were circumstances under which it appears to be absolutely necessary for the wife to sue, as *for the recovery of alimony.* That case was the same, in its circumstances, as this with which we are dealing. The wife libelled

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*Barber v. Barber.*

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for a divorce *a mensa et thoro*, on account of the extreme cruelty of her husband. The divorce was decreed; and the husband was ordered to pay to her alimony, in quarterly instalments. The wife afterwards brought an action against him for arrears. He demurred to the declaration; and judgment was given for her. (*Wheeler v. Wheeler*, 2 Dana, H. 810.)

The same has been held in other cases in that State. It is now established doctrine there, and in some of our other States. They hold that a decree for a divorce, with an allowance for alimony, is as much a judgment as if it had been obtained on the common-law side of the court.

Rogers, Justice, in *Clark v. Clark*, (6 Watts and Sergeant,) places the right to recover arrears of alimony on the ground that the husband, after the decree for a divorce was rendered, had withdrawn himself from the jurisdiction of the court, to prevent him from being forced by attachment to pay the alimony which had been decreed to the wife.

In the State of New York, a wife may file a bill against her husband for alimony; and it appearing that he had abandoned her without any support, and threatened to leave the State, the court, on the wife's petition, granted a writ of *ne exeat res publica* against him. (*Denton v. Denton*, 1 J. C., 2, 364.)

In South Carolina, where the court, having no power to grant divorces, decreed to a wife alimony, on her bill praying for that remedy only, and ordered the husband to give security for its payment, the sheriff, having taken him into custody, suffered him to escape; it was held that the wife might maintain, by her next friend, an action at law against the sheriff for the escape. Smith, Justice, said: "It had been urged in the argument that this woman, being a *feme covert*, could not maintain the action by her next friend. If that argument were to prevail, there would be a failure of justice, which our law abhors, as there would be no means of enforcing a decree of a wife against her husband for alimony. The court of equity could order a refractory husband to be attached, and the sheriff would let him go, if he thought proper; then, if the wife could not sue by her next friend, who could? The law provides no other course. And, upon this occasion, I would adopt the course

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*Barber v. Barber.*

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of a very learned judge, 'if there is no precedent, I will make one.' "

In Ohio, a wife divorced *a mensa et thoro* may maintain ejectment for a lot of land, the use of which was allowed to her as alimony. In Virginia, it was said, in *Purcell v. Purcell*, (4 Hen. and Mansf., 507,) that the court of chancery has jurisdiction in all cases of alimony. In Maryland, the high court of chancery, from the earliest colonial times, exercised the jurisdiction to decree alimony, but not to grant divorces.

This was done under the belief that it belonged to the high court of chancery, in the absence of ecclesiastical tribunals; and in 1777 an act of Assembly provided that the chancellor shall and may hear and determine all causes for alimony, in as full and ample a manner as such causes could be heard and determined by the laws of England, in the ecclesiastical courts there.

Under that statute, alimony is granted to the wife whenever the English courts would be authorized to render a divorce from bed and board; but the court has no power to extend the remedy, and decree a divorce also.

The inherent jurisdiction of a court of equity to decree alimony has also been acknowledged in Alabama. In North Carolina, bills of equity by the wife against the husband, praying alimony, were sustained, from an early day, without question as to the lawfulness of the jurisdiction.

Where such a decree has been made, whether done as an inherent power in equity to grant a decree for alimony, or as an auxiliary to enforce the payment of it as an incident of a divorce *a mensa et thoro*, there are no decisions, either in the English or American books, denying the wife's right to sue her husband for arrears of alimony due, by her next friend.

In some of the States she may do so, without the intervention of her next friend; but she cannot do that, as has been said before, in the courts of the United States having equity jurisdiction.

We think also that the cases which have been cited in this opinion are sufficient to show, whatever may have been the doubts in an earlier day, that a wife under a judicial sentence

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*Barber v. Barber.*

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of separation from bed and board is entitled to make a domicile for herself, different from that of her husband, and that she may by her next friend sue her husband for alimony, which he had been decreed to pay as an incident to such divorce, or when it has been given after such a decree by a supplemental bill. In our best reflections, we have been unable to come to a different result. The privileges allowed to a wife under such circumstances rest upon the facts that the separation is only grantable *propter Sævitiā*; that the alimony commonly allowed is no more than enough to give her a home and a scanty maintenance, almost always necessarily short of that from which her husband has driven her; and that as a consequence she should be permitted to change her domicile, where she may live upon her narrow allowance with most comfort and the least mortification. Her right to sue her husband, by her next friend, for alimony already decreed, rests upon higher considerations, or upon legal principles which have been so well expressed by Chief Justice Shaw, as to her right to sue in the State of Massachusetts, that we will use his language, deeming it to be applicable in any other State in the American Union:

“After such a divorce, the law of this Commonwealth recognises her right to acquire and hold property, to take her own earnings to her own use, for the maintenance of herself and her children. She is deprived of the protection, and exempted from the control, of her husband. She may by the decree of the court granting the divorce, and pursuant to the provision of the statute law of the Commonwealth, be charged with the custody, and consequently with the support and maintenance, of the children of the marriage. The reason, therefore, why a wife cannot sue or be sued without joining or being joined with her husband, does not exist. The relation in which the divorce *a mensa et thoro* places the parties opposes a joinder. If it were necessary to join the husband as plaintiff, he might release her rights, by which she would be subjected to costs; if he might be joined as defendant, he might be made subject to her debts; both of which consequences are repugnant to the true relation of divided and separate interests, in which the law by such a decree places them. Whilst the law thus recog-



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*Barber v. Barber.*

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nises the right of a woman so divorced to acquire and take the proceeds of her industry to her own use, it recognises her power to make contracts; and if she could not sue and be sued, it would present the anomalous case in which the law recognises a right without affording a remedy for vindicating it, and subjects a party to a duty without lending its aid to enforce it."

We do not deem it necessary to show, further than it has already been done in this opinion, that the equity side of the court was the appropriate tribunal for this cause. We have, however, verified the correctness and applicability of several of the cases cited in his argument by the counsel of the complainant to sustain that point, and deem them decisive.

The only point remaining for our determination is that which questions the complainant's right to pursue her remedy in the equity side of the District Court of the United States in the State of Wisconsin.

The facts are, that she married the defendant in the State of New York, the State then of her husband's domicile; that they lived there until the decree of separation was made; that she has retained it ever since as her domicile, but that the defendant, after the decree of separation was given, left her domicile in New York for another in the State of Wisconsin, in which he says that he has acquired a domicile. The complainant comes into court in the character of citizen of the State of New York. Mrs. Barber is recognised to be such by the laws of that State, and her *status* as a divorced woman *a mensa et thoro* by a court of competent jurisdiction in New York, and the rights of citizenship which she has under it there, are decisive of her right to sue in the courts of the United States, as that has been done in this instance. The citizenship of the defendant is admitted and claimed by him to be in the State of Wisconsin. His voluntary change of domicile from New York to Wisconsin makes him suable there. That might have been done in a State court in equity as well as in the District Court of the United States; but she had a right to pursue her remedy in either. She has chosen to do so in a court of the United States, which has jurisdiction over the subject-matter of her claim to the same extent that a court of equity of a State has, and we think that the

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*Barber v. Barber.*

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court below has not committed error in sustaining its jurisdiction over this cause, nor in the decree which it has made. We affirm the decree of that court, and direct a mandate to be issued accordingly.

Mr. Chief Justice TANEY, Mr. Justice DANIEL, and Mr. Justice CAMPBELL, dissented.

Mr Justice DANIEL :

From several considerations, which to me appear essentially important, I am constrained to differ in opinion with the majority of the court in this case.

1. With respect to the authority of the courts of the United States to adjudicate upon a controversy and between parties such as are presented by the record before us. Those courts, by the Constitution and laws of the United States, are invested with jurisdiction in controversies between citizens of different States. In the exercise of this jurisdiction, we are forced to inquire, from the facts disclosed in the cause, whether during the existence of the marriage relation between these parties the husband and wife can be regarded as citizens of different States? Whether, indeed, by any regular legal deduction consistent with that relation, the wife can, as to her civil or political *status*, be regarded as a citizen or person?

By Coke and Blackstone it is said: "That by marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union in husband and wife, depend almost all the rights, duties, and disabilities, that either of them acquire by the marriage. For this reason, a man cannot grant anything to his wife, nor enter into a covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is generally true, that all acts made between husband and wife, when single, are void by the intermarriage." (Co. Lit., 112; Bla. Com., vol.

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*Barber v. Barber.*

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1, p. 442.) So, too, Chancellor Kent, (vol. 2, p. 128 :) "The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union."

Such being the undoubted law of marriage, how can it be conceived that pending the existence of this relation the unity it creates can be reconciled with separate and independent capacities in that unity, such as belong to beings wholly disconnected, and each *sui juris*? Now, the divorce *a mensa et thoro* does not sever the matrimonial tie; on the contrary, it recognises and sustains that tie, and the allowance of alimony arises from and depends upon reciprocal duties and obligations involved in that connection. The wife can have no claim to alimony but as wife, and such as arises from the performance of her duties as wife; the husband sustains no responsibilities save those which flow from his character and obligations as husband, presupposing the existence and fulfilment of conjugal obligations on the part of the wife. It has been suggested that by the regulations of some of the States a married woman, after separation, is permitted to choose a residence in a community or locality different from that in which she resided anterior to the separation, and different from the residence of the husband. It is presumed, however, that no regulation, express or special, can be requisite in order to create such a permission. This would seem to be implied in the divorce itself; the purpose of which is, that the wife should no longer remain *sub potestate viri*, but should be freed from the control which had been abused, and should be empowered to select a residence and such associations as would be promotive of her safety and her comfort. But whether expressed in the decree for separation, or implied in the divorce, such a privilege does not destroy the marriage relation; much less does it remit the parties to the position in which they stood before marriage, and create or revive ante-nuptial, civil, or political rights in the wife. Both parties remain subject to the obligations and duties of husband and wife. Neither can marry during the

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*Barber v. Barber.*

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lifetime of the other, nor do any act whatsoever which is a wrong upon the conjugal rights and obligations of either. From these views it seems to me to follow, that a married woman cannot during the existence of the matrimonial relation, and during the life of the husband the wife cannot be remitted to the civil or political position of a *feme sole*, and cannot therefore become a *citizen* of a State or community different from that of which her husband is a member.

2. It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household. If such functions are to be exercised by the Federal tribunals, it is important to inquire by what rule or system of proceeding, or according to what standard, either of ethics or police, they are to be enforced. Within the range subjected to the political, general, and uniform control of the Federal Constitution, there are numerous commonwealths, and within these are ordinances much more numerous and diversified, for the definition and enforcement of the duties of their respective members. Now, to which of these ordinances, or to which of these various systems of regulation, will the Federal authorities resort as a source of jurisdiction, or as a rule of decision, especially when it is borne in mind that it is only between members of different communities, persons legitimately subject to such separate rules of obligation or policy, that the tribunals of the Federal Government have cognizance; when, too, it is recollected that the Federal Government is clothed with no power to execute the laws of the States. The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.

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*Barber v. Barber.*

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It has been suggested, that by the decree for separation *à mensa et thoro*, the husband and wife have become citizens of different States, and that the allowance to the wife is in the nature of a debt, which, as a citizen of a different State, she may enforce against the husband in the Federal courts. This suggestion, to my mind, involves two obvious fallacies. The first is the assumption, that by the decree the wife is made a citizen at all, or a person *sui juris*, whilst yet she is wife, still bound by her conjugal obligations, the faithful observance of which, on her part, is the foundation of her claim to maintenance as wife, and which claim she would forfeit at any time by a violation of these obligations. Indeed, the form of her application is an acknowledgment that she is not *sui juris*, and not released from her conjugal disabilities and obligations, for she sues by *prochein ami*.

The second error in the position before mentioned is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. It is not unconditional, but always dependent upon the personal merits and conduct of the wife—merits and conduct which must exist and continue, in order to constitute a valid claim to such an allowance. This allowance might unquestionably be forfeited upon proof of criminality or misconduct of the wife, who would not be permitted to enforce the payment of that to which it should be shown she had lost all just claim; and this inhibition, it is presumed, might embrace as well a portion of that allowance at any time in arrears, as its demand in future. The essential character, then, of this allowance, viz: its being always conditional and dependent, both for its origin and continuation, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances. That authority can exist nowhere but with the power and the right to control the private and domestic relations of life. The Federal Government has no such power; it has no commission of *censuræ morum* over the several States and their people.

But, irrespective of the disability of the wife as a party, I

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*Barber v. Barber.*

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hold that the courts of the United States, as courts of *chancery*, cannot take cognizance of cases of alimony.

It has been repeatedly ruled by this court, that the jurisdiction and practice in the courts of the United States in *equity* are not to be governed by the practice in the State courts, but that they are to be apprehended and exercised according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Such is the law as announced in the cases of *Robenson v. Campbell*, (3 Wheaton, 212;) of the United States *v. Howland*, (4 Wheaton, 108;) of *Boyle v. Zacharie & Turner*, (6 Peters, 648.) It is repeated in the cases of *Story v. Livingston*, (18 Peters, 359,) and of *Gaines v. Relf*, (15 Peters, 9.) Now, it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised. Of these matters, the court of chancery in England claims no cognizance. Upon questions of settlement or of contract connected with marriages, the court of chancery will undertake the enforcement of such contracts, but does not decree alimony as such, and independently of such contracts.

In *Roper on the Law of Baron and Feme*, (vol. 2, p. 307,) it is stated that Lord Loughborough, in a case in 1 Vesey, jun., 195, is reported to have said, that if a wife applied to the court of chancery upon a *supplicavit* for security of the *peace* against her husband, and it was necessary that she should live apart as incidental to that, the chancellor will allow her separate maintenance. That this passage has been quoted by Sir William Grant in 10 Ves., 397, and that the same opinion was advanced in the case of *Lambert v. Lambert*, (2 Brown's Parliamentary Cases, p. 26.) "But," continues this writer, "there seems to be no reported instance of such a jurisdiction, and it would be inconsistent with the object and form of the writ of *supplicavit*;" and he concludes with the position that "the wife can only obtain a separate maintenance in the ecclesiastical courts where alimony is decreed to be paid during the pendency of any suit between husband and wife, and after its

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*Barber v. Barber.*

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termination, if it ends in a sentence of separation on the ground of the husband's misconduct."

From the above views, it would seem to follow, inevitably, that as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States *in chancery* is equally excluded.

It has been said that, there being no ecclesiastical court in the United States, many of the States have assumed jurisdiction over the subjects of divorce and alimony, through the agency of their courts of equity. The answer to this suggestion is, first, that it concedes the distinction between the character and powers of these different tribunals. In the next place, it may have been that the jurisdiction exercised by the State courts may have been conferred by express legislative grant; or it may have been assumed by those tribunals, and acquiesced in from considerations of convenience, or from mere toleration; but whether expressly conferred upon the State courts, or tacitly assumed by them, their example and practice cannot be recognised as sources of authority by the courts of the United States. The origin and the extent of their jurisdiction must be sought in the laws of the United States, and in the settled rules and principles by which those laws have bound them.





# INDEX

OF THE

## PRINCIPAL MATTERS.

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### ADMIRALTY.

1. Where a steamer approaches an object at night, and the captain is uncertain what it is, he should slacken his speed. If he does not take this precaution, his vessel will be responsible in case of a collision with another vessel. *Steamer Louisiana v. Fisher et al.* 1.
2. The night was not so dark as to make it the duty of the schooner to show a light. The schooner was discerned by the steamer in sufficient time to have avoided the collision, if proper care had been exercised. *Ibid.*
3. Where a general ship, employed in navigating the lakes, receives goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, her liability must be determined by the rules of law applicable to carriers of goods upon such inland waters. *Propeller Niagara v. Cordes*, 7.
4. A common carrier by water, as on land, is responsible for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. *Ibid.*
5. Amongst the duties imposed upon carriers by water, one is to see that the vessel is provided with a competent and skilful master. *Ibid.*
6. The act of Congress, passed on the 3d of March, 1851, (9 Stat. at L., 635,) limiting the liability of ship owners, does not apply to the present case. *Ibid.*
7. After a vessel is stranded, there is still an obligation upon the master to take all possible care of the cargo. His duties in that respect are not varied by that event, and proof merely of reasonable care and diligence will not excuse him from liability. *Ibid.*
8. Where a vessel put into Presque Isle at night, in a storm, upon Lake Huron, the evidence does not justify this court in adjudging that the master could have kept on his course, nor in holding the vessel responsible for an error in judgment in the master, in the measures which he adopted after he had succeeded in entering the harbor. *Ibid.*
9. But after the vessel was stranded, he was guilty of culpable negligence in not protecting the cargo with sufficient care, and in returning home and

ADMIRALTY, (*Continued.*)

- allowing the cargo to remain in the vessel during the remaining part of the winter, and until a late day in the spring. *Ibid.*
10. A master must not abandon his ship and cargo upon any grounds, so far as the goods are concerned, when it is practicable for human exertion, skill, and prudence, to save them from the impending peril. *Ibid.*
  11. An ordinance of the city authorities of Charleston, prescribing where a vessel may lie in the harbor, how long she may remain there, what light she must show at night, and making other similar regulations, is not in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States. It is therefore valid. *Brig James Gray v. John Fraser*, 184.
  12. A vessel at anchor is bound to show such a light as is required by the local regulations. *Ibid.*
  13. Where a vessel, being towed into port by a steam-tug, came into collision with a vessel at anchor, and the steam-tug and vessel at anchor were both in fault, the loss must be equally divided between them, provided the ship in tow was thrown against the vessel at anchor without any fault or negligence on the part of the vessel in tow. *Ibid.*
  14. The act of Congress passed on the 26th of February, 1845, (5 Stat. at L., 726,) confines the admiralty jurisdiction of the Federal courts upon the lakes to matters of contract and tort arising in, upon, or concerning steamboats and other vessels employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes. *Allen v. Newberry*, 244.
  15. It does not extend, therefore, to a case where there was a shipment of goods from a port in a State to another port in the same State, both being in Wisconsin. *Ibid.*
  16. And this is so, although the vessel was a general ship, and bound, upon the voyage in question, to Chicago, a port in the State of Illinois. *Ibid.*
  17. What would be done in a case of general average, the court does not now decide. *Ibid.*
  18. And a contract for supplies furnished to a vessel engaged in such a trade is subject to the same limitation. *Maguire v. Card*, 248.
  19. A rule in admiralty, adopted at the present term, takes from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs, which had been assumed upon the authority of a lien given by State laws. *Ibid.*
  20. The reason of the rule explained. *Ibid.*
  21. The rules of pleading in admiralty must be strictly complied with. The evidence and arguments confined to the points put in issue by the allegations of the libel and denial of the answer. *McKinley v. Morrish*, 243.
  22. Where the allegation of a libel was, that a cargo of soap had been injured by bad stowage, and by negligence of the captain that he had allowed the seams of the deck to be in an open and leaking condition, by which water had passed through them upon the soap, the evidence shows that the cargo was not injured by bad stowage or leaking from the deck. *Ibid.*

ADMIRALTY, (*Continued.*)

23. The injury to the cargo was caused by the sweat of the ship, her rocking, the nature of the compound of soap, and its long agitation in the boxes, to which it had been subjected in a boisterous passage. *Ibid.*
24. The rule is well established, that a consignee may sue in a court of admiralty, either in his own name, as agent, or in the name of his principal, as he thinks best. *Ibid.*
25. In a collision between a sailing vessel and a steamer, which took place at sea near the shore of Long Island, where the course of the sailing vessel was converging to the track of the steamer, the sailing vessel being then close hauled upon the wind, the evidence shows that the steamer was in fault. *New York and Liverpool Mail Steamship Company v. Bumball*, 372.
26. The sailing vessel did not change her course, and her whole company, including the master and mate, were on deck. *Ibid.*
27. The rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. *Ibid.*
28. These rules require sailing vessels, when approaching a steamer, to keep their course; and steamers, under such circumstances, as a general rule, are required to keep out of the way. *Ibid.*
29. Under this rule, the steamer must of necessity determine for herself, and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left, or to stop; and in order that she may not be deprived of the means of determining the matter wisely, it is required that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty, and fulfil the requirement of the law to keep out of the way. *Ibid.*
30. Exceptional cases may be imagined; and where the rule could not be followed without defeating the end for which it was established, or without producing the mischief which it was the design of the rule to avert, of course it would not be applicable, and, in such a case, a departure from it would be both justifiable and commendable. *Ibid.*
31. But this not being such a case, the steamer must be responsible for the loss occasioned by the collision. *Ibid.*
32. The cases decided by this court referred to. *Ibid.*
33. Where the District Court of the United States, sitting in admiralty, decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, this was not such a final decree as would justify an appeal to the Circuit Court. *Montgomery v. Anderson*, 386.
34. The Circuit Court, therefore, had no jurisdiction, and its judgment, affirming the decree of the District Court, and remanding the case to that court, was erroneous. *Ibid.*
35. Moreover, if it had jurisdiction, it was not authorized to remand the case to the District Court. The appeal had carried up the fund, and the Circuit Court should have executed its own decree. *Ibid.*

ADMIRALTY, (*Continued.*)

36. An agreement of counsel, filed in this court, stating that the whole fund had been distributed, will not correct the error. This court has heretofore decided that consent of counsel will not confer jurisdiction. *Ibid*
37. The decree of the Circuit Court must be reversed, and the case remanded to that court, with directions to dismiss the case for want of jurisdiction. *Ibid.*
38. When freight is payable and when goods are to be delivered from a ship *See Brittan v. Barnaby*, 529.
39. Where two steam-tugs are approaching a vessel from different directions, in order to secure the contract of towing her into harbor, the established rules are, that the steamer which is following in the wake of the vessel should come up on her starboard quarter and slack her engine, whilst the steamer which is approaching from the opposite direction should round to, either to windward or leeward, so as to head the same way as the vessel. *Sturgis v. Clough*, 451.
40. In the present case, the evidence shows that the master and pilot of the last-mentioned steamer were in fault by not conforming to the established rule, and thereby caused the collision which ensued between the two steamers. *Ibid.*
41. In a collision which took place upon Lake Erie, between the propeller Ogdensburgh and the steamer Atlantic, the propeller was in fault—
  1. Because she did not have a competent and skilful officer in charge of her deck, and his want of qualifications and skilfulness contributed to the collision. Owners of steamships must employ skilful and competent officers; and the remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all the time they have charge of the deck.
  2. Because she did not have signal lights properly displayed, as required by law. But the failure to show the lights, which are directed by the act of Congress, does not of itself throw the entire responsibility upon the offending party, where the other vessel also is in fault.
  3. Because the officer in charge of her deck neglected to seasonably change her helm, and persistently kept her on her course, after he discovered the signal lights of the steamer.
42. The Atlantic was in fault—
  1. Because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel, after he discovered the white lights, which subsequently proved to be the white lights of the propeller.
  2. She was also in fault because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engines after he discovered those lights, so as to prevent collision.
  3. Because she did not have a vigilant and sufficient look-out. Ocean steamers usually have two look-outs, in addition to the officer of the deck; and in general they are stationed, one on the larboard and the other on the starboard side of the vessel, as far forward as possible, and during the time they are so engaged, they have no other duties to per-

ADMIRALTY, (*Continued.*)

form; and no reason is perceived why any less precaution should be taken by first-class steamers on the lakes.

43. Being a case of mutual fault, the decree of the Circuit Court, apportioning the damages, is affirmed. *Chamberlain v. Ward*, 548.

AGENTS.

1. An agreement between a claimant and certain persons in Washington, whereby the claimant agreed to allow those persons a proportion of what might be recovered, was terminated when the United States and Great Britain made a convention, providing for the appointment of a board of commissioners to decide upon claims, in which the one in question was included. *Pemberton v. Lockett*, 257.
2. The agreement looked only to the services in Washington of the persons employed; and the facts of the case indicate that such was the intention of the parties. *Ibid.*
3. Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract; and, although the contract be in writing, parol evidence is admissible to show that the agent was acting for his principal. *Ford v. Williams*, 288.
4. The rule is well established that a consignee may sue in a court of admiralty, either in his own name, as agent, or in the name of his principal, as he thinks best. *McKinlay v. Morrish*, 343.

APPEALS.

1. There being no special provision in the act of Congress regulating appeals from the District Court of the United States in Wisconsin, they are governed by the general law of 1803. *Richmond v. City of Milwaukee*, 80.
2. By that act, no appeal will lie unless the sum or value in controversy exceeds two thousand dollars. *Ibid.*
3. Where the District Court of the United States, sitting in admiralty, decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, this was not such a final decree as would justify an appeal to the Circuit Court. *Montgomery v. Anderson*, 386.
4. The Circuit Court, therefore, had no jurisdiction, and its judgment, affirming the decree of the District Court, and remanding the case to that court, was erroneous. *Ibid.*
5. Moreover, if it had jurisdiction, it was not authorized to remand the case to the District Court. The appeal had carried up the fund, and the Circuit Court should have executed its own decree. *Ibid.*
6. An agreement of counsel, filed in this court, stating that the whole fund had been distributed, will not correct the error. This court has heretofore decided that consent of counsel will not confer jurisdiction. *Ibid.*
7. The decree of the Circuit Court must be reversed, and the case remanded to that court, with directions to dismiss the case for want of jurisdiction. *Ibid.*

ARKANSAS.

See EJECTMENT.

**ASSIGNMENT.**

1. In Pennsylvania, where a transfer of certain accounts was made, the assignee had only an equitable interest, and could not sue in his own name. But when the suit was brought in Louisiana, where there is no distinction between a legal and equitable title, he could maintain the suit in his own name, and the assignment was good evidence. *Martin v. Johnson*, 395.

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**

1. An assignment made in Rhode Island of property in New York, for the benefit of a particular class of creditors, held good under the special circumstances of the case. *Livermore v. Jenckes*, 126.

**BANKS.**

See CORPORATIONS.

**BILL OF EXCEPTIONS.**

1. Where the parties to an ejectment suit agreed to waive a trial by jury, and that both matters of law and of fact should be submitted to the decision of the court, and then a bill of exceptions was brought up to this court to all the rulings and decisions of the court below, this court cannot look into errors of fact or errors of law alleged to have been committed in such an irregular proceeding, and the judgment of the court below will be affirmed. *Kelsey v. Forsyth*, 85.

**BOND.**

1. The obligation of the surety is *strictissimi juris*, and he cannot be called upon to pay more than the penalty of his bond. *Leggett v. Humphreys*, 66.
2. As he was not permitted to plead *puis darrein continuance*, the satisfaction of the penalty of his bond, &c., he is entitled to relief in equity. *Ibid.*
3. The obligor in a bond has a right to convey property for the purpose of indemnifying his surety, provided it be done *bona fide*, and there is no lien upon the property of the obligor. *Ibid.*

**CALIFORNIA.**

See LANDS, PUBLIC.

**CANAL COMPANY.**

See CORPORATIONS.

**CHANCERY.**

1. A surety in a bond who was not permitted to plead *puis darrein continuance* the satisfaction of the penalty of the bond, was entitled to relief in equity. *Leggett v. Humphreys*, 66.
2. Where there was a judgment at law against a bridge company, under which the tolls were sold in execution, a court of equity has power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgment at law. *Covington Drawbridge Company v. Shepherd*, 112.
3. The laws of Rhode Island allow an assignment to be made by a failing debtor, for the benefit of certain preferred creditors, and for the exclusion of those who should refuse to execute releases from their respective claims. *Livermore v. Jenckes*, 126.
4. The laws of New York do not permit such assignments. *Ibid.*

CHANCERY, (*Continued.*)

- 5 Where an assignment with the above reservation was made in Rhode Island by a person and to persons residing there, which conveyed to trustees certain property in Rhode Island, and also property in New York, it was proper for the Circuit Court of New York to dismiss a bill filed by creditors residing there, provided there was no fraud in fact in the assignment. *Ibid.*
6. The complainants never acquired nor ever had any lien upon the property in New York, so as to subject it legally or equitably to their demand against the failing debtors, either before or after it was carried into judgment in the Supreme Court of New York. *Ibid.*
7. After various proceedings in the mode of deeds, bonds, &c., the legal title to a piece of property became vested in one person, and the equitable title in another. *Smith v. Orton*, 241.
8. The holder of the equitable title has a right to file a bill against the holder of the legal title, to compel him to convey such legal title upon clearing off the encumbrances. *Ibid.*
9. This right is not destroyed by the circumstance that the holder of the legal title had succeeded in a suit against another holder of the legal title, to which suit the holder of the equitable title was not a party. *Ibid.*
10. The fact that neither party is in actual possession of the premises is of no consequence, because the controversy is with respect to the legal title. *Ibid.*
11. The cases referred to, showing the necessity of preserving the distinction between legal and equitable rights and remedies. *Fenn v. Holme*, 481.
12. The certificate of probate of a deed in Tennessee did not say that the witness swore that the grantor acknowledged it on the day of its date. But as the certificate said that the grantor acknowledged it for the purposes therein contained, the probate is covered by an act passed in 1846. *Lea v. Polk County Copper Company*, 494.
13. Where a grant conveyed the legal title in 1842, and innocent purchasers paid for the property, and took legal conveyances for it, with an honest belief that they were dealing for and acquiring a legal title from the true owner, a claimant of the equity of the patent cannot set it up to overthrow the purchase. *Ibid.*
14. There was nothing in the case to cause suspicion in the minds of these purchasers. Three letters were added in the patent to the original name of the patentee. But the register did this in the course of his official duty, and, as this court believe, honestly; if the purchasers had gone into the inquiry, the presumption would have been that the register did his duty. *Ibid.*
15. These innocent purchasers might properly buy up an outstanding title. *Ibid.*
16. Where a person was in possession, this was sufficient notice to a claimant of an adverse title; and whether the deed under which this person claimed was registered or not, was of no importance to the claimant. *Ibid.*
17. The act of limitations of the State of Tennessee protects persons in possession of land under the following circumstances

CHANCERY, (*Continued.*)

1. They must have had seven years' possession of land granted by the State. *Ibid.*
2. They must have held or claimed the land by virtue of a deed of conveyance, or other assurance, purporting to convey an estate in fee simple. *Ibid.*
3. No claim by suit in law or equity, effectually prosecuted, should have been set up, or made to said lands, within that time. *Ibid.*
18. Under the second head, an unregistered deed is sufficient to constitute the bar. The deed, when recorded, related back to its date. *Ibid.*
19. The possession of several persons in succession, claiming under the same title, was the same possession; and the evidence shows that the persons claiming under the statute were in possession for the required period of time. *Ibid.*
20. Courts of justice lend a very unwilling ear to statements of what dead men have said. *Ibid.*
21. The allegation that the possession was fraudulent, under a fraudulent grant and fraudulent deed, is not sustained by the evidence. Whether the deed which purported to convey an estate in fee simple was void or not, is immaterial, as the act of limitation intended to protect possession held under such deeds. The adverse possession was notice to everybody of the existence of the claim. *Ibid.*
22. By an act of Congress, passed on the 3d of March, 1835, (4 Stat. at L., 771,) a certain quantity of land was appropriated to the satisfaction of Virginia military land warrants, with a proviso that if the land was not enough to satisfy the warrants, a distribution should be made *pro rata*, in full satisfaction of the warrants. Under it a dividend of ninety per cent. was made. *Walker v. Smith*, 579.
23. In 1852 (10 Stat. at L., 143) another act was passed, providing for the deficiency of ten per cent., and directing the Secretary of the Interior to issue land scrip in favor of the "present proprietors" of any warrant thus surrendered. *Ibid.*
24. A bill in chancery for an injunction to prevent the Secretary from issuing the scrip to one of two claimants cannot be sustained. The Secretary must decide, and then it becomes a chose in action, upon which a court can act. *Ibid.*
25. Moreover, in this case the complainant has not made out such a case as to entitle him to relief. *Ibid.*
26. This court disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to a divorce *a vinculo*, or to one from bed and board. *Barber v. Barber*, 582.
27. But where a court of competent jurisdiction in New York decreed a divorce *a mensa et thoro* between man and wife, allowing alimony to the latter, and the husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony, or leaving any estate of any kind out of which it could be paid, the wife can sue by her next



CHANCERY, (*Continued.*)

- friend in a court of the United States, having equity jurisdiction, to recover the amount of alimony decreed by the State court. *Ibid.*
28. A divorce *a vinculo*, obtained in Wisconsin without a disclosure of the circumstances of the divorce case in New York, and upon the allegation by the husband that the wife had wilfully abandoned him, cannot release the husband there and everywhere else from his liability to the decree made against him in New York, upon that decree being carried into judgment in a court of another State of this Union or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile, differing from that which he had in New York when the decree was made there against him. *Ibid.*
29. The cases in England and in the United States examined, in which a wife may sue her husband by her next friend. *Ibid.*
30. A court of chancery in England will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court, and the principal reason for its exercise is equally applicable to courts of equity in the United States. The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given by the ecclesiastical court of England. *Ibid.*
31. This court has heretofore decided, and now reaffirms, that in order to bar the jurisdiction of the courts of the United States in equity, the remedy at law must be as practical and efficacious to the ends of justice and its prompt administration as the remedy in equity; and it is no objection to such equity jurisdiction that there is a remedy under the local law. *Ibid.*
32. After the divorce *a mensa et thoro* in New York, and the removal of the husband to Wisconsin, the domicile of the wife did not follow that of the husband, but remained unchanged in New York. The jurisdiction of the United States court therefore attached as it respected the different citizenship of the parties. *Ibid.*
33. The American and English authorities upon this point examined. *Ibid.*
34. A wife under a judicial sentence of separation from bed and board is entitled to make a domicile for herself different from that of her husband; and she may, by her next friend, sue her husband for alimony which he had been decreed to pay as an incident to such divorce, or when it has been given after such a decree by a supplemental bill. *Ibid.*
35. The equity side of the court was the appropriate tribunal before which she was to sue; and the District Court of the United States in the State of Wisconsin had jurisdiction over the case. *Ibid.*

COLLECTORS OF THE CUSTOM-HOUSES.

See *DUTIES*.

1. The provisions in the appropriation acts of 1849 and 1850, &c., &c., must be construed in connection with the previous laws in relation to the same subject-matter. *Converse v. United States*, 464.
2. A compensation for extra services where no certain compensation is fixed by law cannot be allowed by the head of a Department to any officer

COLLECTORS OF THE CUSTOM-HOUSES, (*Continued.*)

- of the Government who has by law a fixed or certain compensation for his services in the office he holds. Nor can it be allowed by the court or jury as a set-off in a suit brought by the United States against an officer for public money in his hands. *Ibid.*
3. No allowance beyond his fixed compensation can be made except for the performance of certain duties required by law to be performed, for which the law grants a certain compensation to be paid, and which have no connection with the duties of the office he holds. *Ibid.*
  4. The Secretary of the Treasury, under the acts of Congress above mentioned, was authorized to appoint an agent to purchase all the supplies necessary for the light-house service throughout the United States, and to make the necessary disbursements therefor. And such agent was entitled to a compensation of two and a half per cent. on the amount disbursed, and the money was appropriated to pay it. *Ibid.*
  5. The Secretary had a right, under these laws, to select as agent any one already holding office, if he supposed him to be best qualified for the duty. But he had no right to order a collector of the revenue, or any other officer of the Government, to perform this duty without compensation outside of the light-house district of which he was superintendent, or outside of and alien to the office he held. *Ibid.*
  6. The collector of Boston, having been the agent selected by the Treasury Department to purchase supplies for the light-house service throughout the United States, and to make the disbursements, is entitled to the compensation fixed by law for this service, so far as it was outside of his district and beyond the limits to which his duties as an officer extended. *Ibid.*
  7. It has not been the policy of the United States to give unlimited power to the heads of departments over the subordinate officers of the Government whose salaries and duties are regulated by law. *Ibid.*

## COLLISION OF VESSELS.

See ADMIRALTY.

## COMMERCIAL LAW.

See ADMIRALTY AND CORPORATIONS.

1. Where a vessel was chartered to bring a cargo of guano from the Chincha Islands to the United States, at the rate of twenty-five dollars per ton freight, with a stipulation that the ship should be entitled to any advance in the guano freight made by the charterers, and they subsequently chartered vessels to go from the United States for guano, (reserving certain privileges to the charterers,) at the rate of thirty dollars per ton freight, it was proper for the Circuit Court to leave it to the jury to say, from all the evidence in the case, whether or not the real contract in the last charters was to bring home guano at the rate of thirty dollars per ton freight. *Barreda v. Silsbee*, 146.
2. Contingent agreements between merchants and ship-owners ought to receive a reasonable construction, so as to carry their intentions into effect, and, in general, those intentions must be gathered from the language employed, the surrounding circumstances, and the subject-matter *Ibid.*

JOMMERCIAL LAW, (*Continued.*)

3. The case of *Gether v. Capper*, 80 Eng. C. L., examined. *Ibid.*
4. The declarations and statements of the agents of the charterers, made at the time of the execution of the subsequent charters above mentioned, were properly admitted in evidence as part of the *res gestae*, and to show that the charterers were acting in bad faith towards the owners of the vessel which was first chartered. *Ibid.*
5. Where the effect of a written agreement, collaterally introduced as evidence, depends not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. *Ibid.*
6. Moreover, the fact whether or not the charterers had paid thirty dollars per ton freight might have been proved by oral as well as written evidence. *Ibid.*
7. The authorities examined. *Ibid.*
8. Although the contracts between the charterers and the last owners might have been fair as between themselves, yet, if their effect was to work an unfairness to the first owners, parol evidence was admissible to show it. *Ibid.*
9. Where certain persons gave a joint and several note for the purpose of raising money, and their agent received a certificate of deposit, which certificate was afterwards duly paid upon presentation, the signers of the note cannot escape from their responsibility upon the plea that a certificate of deposit was not money. *Poorman v. Woodward*, 266.
10. Where the cashier of a bank wrote to the Secretary of the Treasury, saying that the bearer of the letter was authorized to contract for the transfer of money from New York to New Orleans, and such a transaction was not within the scope of the powers of the cashier, nor authorized by the directors, the bank was not bound to reimburse the money which the Secretary of the Treasury advanced. *United States v. City Bank of Columbus*, 356.
11. Where certificates of the public debt of Texas were transferable only by the owner, or his legal representative or attorney, and there is no sufficient evidence of the existence of a power of attorney, a mere endorsement in blank by the owner is not sufficient to justify a purchaser in drawing a conclusion that the holder is entitled to sell or discount it. *Combs v. Hodge*, 397.
12. The difference between this and negotiable instruments explained, and the authorities examined. *Ibid.*
13. But as the circumstances attending the purchase are not well disclosed in the record, the court will remand the case to the Circuit Court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised. *Ibid.*
14. Where an accommodation bill of exchange was paid by one of the endorsers, and there was no special agreement that they should be bound to pay in equal proportions as co-sureties, the endorser who took it up had a right to assign it as collateral security for a pre-existing debt; and the assignee can maintain a suit against the original payee, who was also an endorser. *McCarty v. Roots*, 432.

COMMERCIAL LAW, (*Continued.*)

15. The endorser who took up the bill was a trustee; but the plea was defective in not averring that there remained sufficient funds in the trust estate to pay this bill after discharging the trust. *Ibid.*
16. The freight upon a shipment of goods is payable, according to general rules, when the merchandise is in readiness to be delivered to the person having a right to receive it, and when the consignee has had the opportunity to examine the goods, to see if the obligations of the bill of lading have been fulfilled by the ship-owner. *Brittan v. Barnaby*, 529.
17. Where the consignee of a ship gave notice to the consignee of the goods, requiring payment of the freight of the goods as they should be landed from the ship on the wharf, and the consignee of the goods offered to pay the freight of such of the merchandise as had been landed, the latter did all that he was bound to do under the notice, although not bound to do so by the commercial law, and the refusal of the consignee of the ship to receive such *pro rata* freight was unjustifiable. *Ibid.*
18. When the ship-master has a larger shipment under one bill of lading than can be landed in the business hours of one day, he must take care not to land it in such quantities as to be unable to ascertain the *pro rata* freight. Unless he takes this care, the goods landed will be under his care and responsibility without additional expense to the consignee of them until they shall be ready for delivery. *Ibid.*
19. Where the entire freight was demanded when only a part of the goods was ready to be delivered, and the entire freight was refused when the goods were all landed, except upon the condition that the consignee of the goods would pay cartage and storage, this was contrary to the general law upon the subject. *Ibid.*
20. This general law and the nature of freight examined and explained. *Ibid.*
21. Neither party can require from the other that the merchandise shipped under one bill of lading shall be put up into parcels for delivery or for the payment of freight. If the shipment is large, or cannot be landed in a day, the master has a right to ask for security or arrangement for the *pro rata* freight. But he cannot demand the payment of the freight of the entire shipment before the consignee has an opportunity to examine the goods. *Ibid.*
22. The ship is not bound to land an entire shipment in a day; and when landed on different days, if the shipper disregards the notice that such will be the case, and shall not be present to receive the goods, and has made no arrangement for the freight, then they may be stored in the ship-owner's name, to preserve his lien upon them for freight, for safe keeping, at the consignee's expense and risk. *Ibid.*
23. A stamp upon the back of the bill of lading, stating, amongst other things, "that the entire freight was payable prior to delivery, if required," which was put there by the ship's owner, but which there was no evidence was recognised by the shipper as part of his contract, cannot vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery. *Ibid.*
24. The general rule is, that the delivery of the goods at the place of destination, according to the bill of lading, is necessary to entitle the ship to

COMMERCIAL LAW, (*Continued.*)

- freight. The conveyance and delivery is a condition precedent, and must be fulfilled. *Ibid.*
25. This general rule may be varied by stipulations; but they must be in writing, and be signed by the parties, before they can control the operation of the law merchant. *Ibid.*
  26. It is not enough to establish that this was the mode of doing business by the ship-owner, nor that a practice prevailed in conformity with it at the port to which the goods were carried and delivered to a consignee. *Ibid.*
  27. Such a stamp is not equivalent to a memorandum upon a policy of insurance, which is always on the face or the margin of the policy. The rules with respect to policies of insurance explained. *Ibid.*
  28. The practice at San Francisco cannot be received as a custom, and therefore obligatory. Moreover, the practice is not established by evidence. *Ibid.*
  29. Where bonds issued by county commissioners for subscription to a railroad company import on their face a compliance with the law under which they were issued, the purchaser was not bound (in this case) to look further for evidence of a compliance with the condition to the grant of the power. *Knox County v. Aspinwall*, 539.
  30. A suit could be maintained upon the coupons, without the production of the bonds to which they had been attached. *Ibid.*
  31. Bonds issued by a railroad company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the Circuit Court of the United States for Massachusetts. *White v. Vermont and Massachusetts Railroad Co.*, 575.
  32. The eleventh section of the judiciary act does not apply to such a case. *Ibid.*
  33. The usage and practice of railroad companies, and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments. *Ibid.*
  34. The later English authorities upon this point overruled. *Ibid.*

CONSTITUTIONAL LAW.

1. A statute of the State of New York, making it unlawful for any persons other than Indians to settle or reside upon any lands belonging to or occupied by any nation or tribe of Indians within that State, and providing for the summary ejectment of such persons, is not in conflict with the Constitution of the United States, or any treaty, or act of Congress, and the proceedings under it did not deprive the persons thus removed of property or rights secured to them by any treaty or act of Congress. *State of New York v. Dibble*, 366.
2. The process of a State court or judge has no authority beyond the limits of the sovereignty which confers the judicial power. *Ableman v. Booth*, 506.
3. A *habeas corpus*, issued by a State judge or court, has no authority within the limits of the sovereignty assigned by the Constitution to the United States. The sovereignty of the United States and of a State are distinct

CONSTITUTIONAL LAW, (*Continued.*)

- and independent of each other within their respective spheres of action, although both exist and exercise their powers within the same territorial limits. *Ibid.*
4. When a writ of *habeas corpus* is served on a marshal or other person having a prisoner in custody under the authority of the United States, it is his duty, by a proper return, to make known to the State judge or court the authority by which he holds him. But, at the same time, it is his duty not to obey the process of the State authority, but to obey and execute the process of the United States. *Ibid.*
  5. This court has appellate power in all cases arising under the Constitution and laws of the United States, with such exceptions and regulations as Congress may make, whether the cases arise in a State court or an inferior court of the United States. And, under the act of Congress of 1789, when the decision of the State court is against the right claimed under the Constitution or laws of the United States, a writ of error will lie to bring the judgment of the State court before this court for re-examination and revision. *Ibid.*
  6. The act of Congress of September 18, 1850, usually called the fugitive slave law, is constitutional in all its provisions. *Ibid.*
  7. The commissioner appointed by the District Court of the United States for the district of Wisconsin had authority to issue his warrant and commit the defendant in error for an offence against the act of September 18, 1850. *Ibid.*
  8. The District Court of the United States had exclusive jurisdiction to try and punish the offence; and the validity of its proceedings and judgment cannot be re-examined and set aside by any other tribunal. *Ibid.*

## CONTRACT.

1. Where it appeared from the record that a party sold land to a railroad company, the price of which was paid in the stock of the company, guaranteed by certain persons to be at par after a named time, and suit was brought upon this written contract, the case does not appear to be open to a demurrer by the defendants, and the judgment of the court below sustaining such a demurrer must be reversed. It is an original contract, and, being declared on as such, the plaintiffs are entitled to judgment. *Hill v. Smith*, 284.

## CORPORATIONS.

1. A railroad company held responsible for the publication of a libel. *Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley*, 202.
2. Where the cashier of a bank wrote to the Secretary of the Treasury, saying that the bearer of the letter was authorized to contract for the transfer of money from New York to New Orleans, and such a transaction was not within the scope of the powers of the cashier nor authorized by the directors, the bank was not bound to reimburse the money which the Secretary of the Treasury advanced. *United States v. City Bank of Columbus*, 356.
3. Bonds issued by a canal company, pledging the real and personal property of the company for the payment of the debt and interest, and

CORPORATIONS, (*Continued.*)

- containing other corresponding stipulations, will be treated by a court of equity as a mortgage, and enforced according to the intention of the contracting parties. *White Water Valley Canal Co. v. Vallette*, 414.
4. Bonds issued in payment for the completion of the canal were not usurious by the laws of Indiana, although they purport to be for a loan, and although the sum for which they were issued was largely greater than the estimated cost of the work. *Ibid.*
  5. The power to issue these bonds is derived from the charter of the company. Moreover, the contract was sanctioned by a special law of the State. And if the contract had been originally illegal, this law of the State would have prevented either party from setting up the illegality as a defence. *Ibid.*
  6. The decree of the Circuit Court, appointing a receiver, &c., is therefore affirmed. *Ibid.*
  7. Where two separate corporations were created to make railroads, they had no right to unite and conduct their business under one management; nor had they a right to establish a steamboat line, to run in connection with the railroads. *Pearce v. Madison and Indiana Railroad Co.*, 442.
  8. Notes given for the purchase of the steamboat cannot be recovered upon. *Ibid.*
  9. Where the statute of a State provided that the board of commissioners of a county should have power to subscribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of election, and the board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute, it is too late to call in question the existence or regularity of the notices in a suit against them by the holders of the coupons attached to the bonds, who were innocent holders, in this collateral way. *Knox County v. Aspinwall*, 539.
  10. In such a suit, according to the true interpretation of the statute, the board were the proper judges whether or not a majority of the votes in the county had been cast in favor of the subscription to the stock. *Ibid.*
  11. The bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for evidence of a compliance with the condition to the grant of the power. *Ibid.*
  12. A suit could be maintained upon the coupons, without the production of the bonds to which they had been attached. *Ibid.*

## DEMURRER.

See PLEAS and PLEADINGS.

## DIVORCE.

See CHANCERY.

## DOMICIL.

1. The question of domicile, so far as it depends upon the facts, is one for the jury. *Pennsylvania v. Roesnel*, 103.
2. But it was proper for the court to instruct the jury what constituted a domicile in law; and to say, further, that as the husband had his domi-

**DOMICIL, (Continued.)**

- cil in Pennsylvania at the time of his death, the domicil of the widow remained also in Pennsylvania. Whether or not she afterwards changed it to South Carolina, was a question for the jury, to be decided by the evidence. If they believed this evidence, then the domicil of the widow was in South Carolina. *Ibid.*
3. Her acts and declarations, continued for many years, were to be received as evidence of this choice upon her part. *Ibid.*
  4. After the divorce *a mensa et thoro* in New York, and the removal of the husband to Wisconsin, the domicil of the wife did not follow that of the husband, but remained unchanged in New York. The jurisdiction of the United States court therefore attached as it respected the different citizenship of the parties. *Barber v. Barber*, 582.
  5. The American and English authorities upon this point examined. *Ibid.*
  6. A wife under a judicial sentence of separation from bed and board is entitled to make a domicil for herself different from that of her husband. *Ibid.*

**DUTIES AT THE CUSTOM-HOUSES.**

1. The eighth section of the act of Congress, passed in 1846, (9 Stat. at L., 42,) exacting a penal duty of twenty per cent. when the appraised value of goods imported exceeds the invoiced value by ten per cent., does not include the case of an entry by a manufacturer who has produced the article imported. *Belcher v. Lawrason*, 252.
2. Nor did previous laws prior to the act of March 3, 1857, (Session Laws, page 199,) justify this penalty. The last-mentioned law puts goods manufactured and goods purchased upon the same footing in this respect. *Ibid.*
3. But by the act of 1842 (Stat. at L.) an addition of fifty per cent. to the duty is laid upon goods imported by a manufacturer, where the appraised value exceeded the invoiced value by ten per cent. *Ibid.*
4. The appraisal of the goods at the customs was properly made under the 17th section of the act of 1842, although imported and entered by the manufacturer. *Ibid.*
5. A writ of error to this court will not lie in an action against a collector for the return of duties paid under protest where the recovery was for a less sum than two thousand dollars. *Mason v. Gamble*, 390.

**EJECTMENT.**

1. Where there had been an original entry for land made in the office of the Lord Proprietor of the Northern Neck of Virginia, a survey ordered upon that entry, and actually made and returned, and a patent adopting that survey, and founded thereupon, was issued by the Lord Proprietor to a grantee differing in name from the maker of the original entry, these circumstances constitute no ground for vacating or impeaching the legal title vested by the patent. *Brown v. Huger*, 305.
2. The construction of the patent is the proper duty of the court, and not of the jury. *Ibid.*
3. It is a universal rule, that wherever natural or permanent objects are embraced in the calls of a patent or survey, these have absolute control, and both course and distance must yield to their influence. *Ibid.*



**EJECTMENT, (Continued.)**

4. Hence, where a survey and patent call for a boundary to run down a river to its point of junction with another, thence up that other, the rivers are obviously intended as the boundaries, and courses must be disregarded, especially when it is manifest that one of them has been interpolated through error. *Ibid.*
5. The authorities referred to. *Ibid.*
6. Where a deed was objected to in the Circuit Court on the ground of fraud, but no specific grounds of objection were made, this court cannot inquire into the correctness or incorrectness of the objection. *Thomas v. Lawson*, 331.
7. By the laws of Arkansas, and decisions of its courts, a sheriff's deed of land sold for the non-payment of taxes is made evidence of the regularity and legality of the sale, and the burden of proof of irregularity is cast upon the assailant of the tax title. *Ibid.*
8. The cases upon this point examined. *Ibid.*
9. The law also allows the purchaser of a tax title to file a petition on the chancery side of the State court, whose judgment, or decree, confirming the sale, shall operate as a bar against all persons who may claim the land in consequence of informality or illegality in the proceedings which led to the sale. *Ibid.*
10. A record of such a decree, when produced in the Circuit Court, was conclusive evidence of the title of the purchaser at the sheriff's sale. *Ibid.*
11. The plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and evidence of an equitable title will not be sufficient for a recovery. *Fenn v. Holme*, 481.
12. Hence, the holder of a New Madrid certificate, upon which no patent had been issued, and whilst it was yet uncertain whether or not the proposed location of it was reserved under older surveys, could not recover in ejectment. The legal title was in the Government. *Ibid.*
13. The cases referred to, showing the necessity of preserving the distinction between legal and equitable rights and remedies. *Ibid.*
14. The practice of allowing ejectments to be maintained in State courts upon equitable titles cannot affect the jurisdiction of the courts of the United States. *Ibid.*

**EVIDENCE.**

1. Where objection was made, during the trial of a cause, to the reception of the deposition of a witness, which had been taken under a commission, it was properly overruled, because the rules of practice in the Circuit Court of New York give time and opportunity to move for a suppression of the deposition or a re-examination of the witness. *Winans v. New York and Erie Railroad Co.*, 88.
2. The paper which the witness referred to, but did not annex to his deposition, was not in his power. *Ibid.*
3. In the trial of a suit for the violation of a patent right, the court cannot be compelled to receive the evidence of experts as to how a patent ought to be construed. The judge may obtain information from them if he desire it. *Ibid.*

## INDEX.

### EVIDENCE, (*Continued.*)

4. Declarations and statements of the agents of the charterers of vessels made at the time of the execution of the charters, were properly admitted in evidence as part of the *res gestae*, and to show that the charterers were acting in bad faith towards the owners of vessels which had been previously chartered. *Barreda v. Silsbee*, 146.
5. Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract; and, although the contract be in writing, parol evidence is admissible to show that the agent was acting for his principal. *Ford v. Williams*, 288.
6. The pleadings in another suit, where the parties were different, and the petition and answer signed by counsel, cannot be resorted to for admissions of the respective parties. *Combs v. Hodge*, 397.

### FINAL DECREE.

See APPEALS.

### FREIGHT.

1. When freight is payable and when goods are to be delivered from a ship. See *Brittan v. Barnaby*, 529.

### INSURANCE COMPANIES.

1. Under a general act of the Legislature of New York, passed on the 10th of April, 1849, which authorized the incorporation of insurance companies in the State under it, held that the eighth section in the charter of a mutual insurance company formed under the general act, which provided for the payment of cash premiums, at the election of the insured, as well as premiums secured by notes, was authorized by the general act, and that a policy issued upon a payment of the premium in cash was legal and valid. *Union Insurance Co. v. Hoge*, 35.

### JURISDICTION.

1. The admiralty jurisdiction of the courts of the United States does not extend to a case where there was a shipment of goods from a port in a State to another port in the same State. And this is so, although the vessel was a general ship and bound upon the voyage in question to a port in another State. *Allen v. Newberry*, 244.
2. Nor does it extend to a contract for supplies furnished to a vessel engaged in such a trade. *Maguire v. Card*, 248.
3. Congress passed no law in any wise affecting title to lands in the Territory of Oregon until September, 1850; and therefore where a controversy arose, in July, 1850, relating to titles to land, neither party could be said to have a legal title. *Lovnsdale v. Parrish*, 290.
4. Consequently, the amount in controversy could not be ascertained, so as to bring the case within the jurisdiction of this court; and there is no question arising under the Constitution or laws of the United States so as to give jurisdiction. *Ibid.*
5. Where the District Court of the United States, sitting in admiralty, decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, this was not such a final decree as would justify an appeal to the Circuit Court. *Montgomery v. Anderson*, 386.

JURISDICTION, (*Continued.*)

6. An agreement of counsel, filed in this court, stating that the whole fund had been distributed, will not correct the error. This court has heretofore decided that consent of counsel will not confer jurisdiction. *Ibid.*
7. The court again decides that consent of parties cannot give jurisdiction. *Ballance v. Forsyth*, 389.
8. The act of Congress passed on the 3d of May, 1844, (5 Stat. at L., 658,) authorizes a writ of error, at the instance of either party, upon a final judgment in a Circuit Court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due, without regard to the sum or value in controversy. *Mason v. Gamble*, 390.
9. But this law does not include a case where an action was brought against the collector for the return of duties paid under protest, and where the recovery was for a less sum than two thousand dollars. *Ibid.*
10. Such a case must be dismissed for want of jurisdiction. *Ibid.*
11. The practice of allowing ejectments to be maintained in State courts upon equitable titles cannot affect the jurisdiction of the courts of the United States. *Fenn v. Holme*, 481.
12. The decision of this court in 20 Howard, 227, as to what averment in the declaration is sufficient to give jurisdiction to the courts of the United States, again affirmed. *Covington Drawbridge Company v. Shepherd*, 112.
13. After a case has been heard and dismissed for want of jurisdiction, because it did not appear that the value of the property in controversy exceeded two thousand dollars, affidavits of its value come too late. *Richmond v. City of Milwaukee*, 391.
14. Bonds issued by a railroad company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the Circuit Court of the United States for Massachusetts. *White v. Vermont and Massachusetts Railroad Co.*, 575.
15. The eleventh section of the judiciary act does not apply to such a case. *Ibid.*
16. The usage and practice of railroad companies, and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments. *Ibid.*
17. The later English authorities upon this point overruled. *Ibid.*
18. A woman who had been divorced a *mensa et thoro* from her husband by a court of competent jurisdiction in New York can sue in the District Court of the United States, on the equity side, for the alimony which had been decreed to her by the court in New York. *Barber v. Barber*, 582.
19. This court has heretofore decided, and now reaffirms, that in order to bar the jurisdiction of the courts of the United States in equity, the remedy at law must be as practical and efficacious to the ends of justice and its prompt administration as the remedy in equity; and it is ac

JURISDICTION, (*Continued.*)

objection to such equity jurisdiction that there is a remedy under the local law. *Ibid.*

## JURY.

1. The question of domicil, so far as it depends upon the facts, is one for the jury. *Pennsylvania v. Ravenel*, 103.
2. But it was proper for the court to instruct the jury what constituted a domicil in law; and to say, further, that as the husband had his domicil in Pennsylvania at the time of his death, the domicil of the widow remained also in Pennsylvania. Whether or not she afterwards changed it to South Carolina, was a question for the jury, to be decided by the evidence. If they believed this evidence, then the domicil of the widow was in South Carolina. *Ibid.*
3. Her acts and declarations, continued for many years, were to be received as evidence of this choice upon her part. *Ibid.*
4. Where a vessel was chartered to bring a cargo of guano from the Chincha Islands to the United States, at the rate of twenty-five dollars per ton freight, with a stipulation that the ship should be entitled to any advance in the guano freight made by the charterers, and they subsequently chartered vessels to go from the United States for guano, (reserving certain privileges to the charterers,) at the rate of thirty dollars per ton freight, it was proper for the Circuit Court to leave it to the jury to say, from all the evidence in the case, whether or not the real contract in the last charters was to bring home guano at the rate of thirty dollars per ton freight. *Barreda v. Silsbee*, 146.
5. Where the effect of a written agreement, collaterally introduced as evidence, depends not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. *Ibid.*
6. Where the Secretary of the Treasury had power to select school lots, the question, whether or not he had exercised this power, was one to be decided by the jury. *Dickins's Lessee v. Mahana*, 276.
7. The construction of a patent for land issued by the State of Virginia by the lord proprietor was the proper duty of the court, and not of the jury. *Brown v. Huger*, 305.
8. Whether an inventor forbore to apply for a patent until he had perfected his invention, and tested its value by experiments, or negligently postponed his claims, were questions for the jury. *Kendall v. Winsor*, 322.

## LANDS, PUBLIC.

1. The evidence is satisfactory to this court, that Alvarado, the Governor of California, granted a tract of land, to the extent of eleven leagues, to John A. Sutter, in 1841. *United States v. Sutter*, 170.
2. Although the original grant has not been produced, yet there is sufficient proof that it once existed, and was destroyed by fire. A draught of the grant, prepared by the Governor, is found in the archives, and the grant was recorded in the county registry of deeds; and this, together with the other evidence in the case, shows that it was genuine, and also the map which accompanied it. Although the map was incorrect in its lines of latitude, yet it can be located by its reference to natural objects. *Ibid.*

LANDS, PUBLIC, (*Continued.*)

3. This grant was authorized by the colonization laws of 1824 and 1828. *Ibid.*
4. But another grant, purporting to be issued by Micheltorena in 1845, for the surplus of the former grant, being an additional quantity of twenty-two leagues, does not stand in the same position. *Ibid.*
5. Supposing it to be genuine, yet the situation in which Micheltorena was placed at its date was such as to impair its validity. He had been driven from his capital, was not in the peaceful exercise of his official authority, and was shortly after compelled to abdicate. The grant was not recognised by the persons who succeeded him, nor was it produced by the claimant to be placed in the archives. It was not a valid claim at the date of the treaty of Guadalupe Hidalgo. *Ibid.*
6. Grantees under the claim may prosecute it for confirmation in the name of the original claimant. *Ibid.*
7. By an act of Congress passed in 1816, (3 Stat. at L., 266,) a bounty in land was given to those American citizens who were living in Canada at the time when war was declared against Great Britain, in 1812, and who returned to the service of their country. *Lessee of French and Wife v. Spencer*, 228.
8. This act was not like other bounty-land acts, by which the Government undertook to locate the bounty land. Under the act first mentioned, the warrants were delivered to the owners to be located by them, and were therefore assignable after an entry was made in the Land Office. *Ibid.*
9. The deed of conveyance in question was sufficient to pass the interest of the grantor. *Ibid.*
10. A patent issued to the original beneficiary, who had previously sold his right inured to the benefit of the purchaser, and related back to the date of the entry; and the heir of the grantor in such a deed is estopped from setting up a legal title under the patent. *Ibid.*
11. In 1792, Congress granted to certain persons a tract of land in Ohio, upon the condition that they would lay off lots of an hundred acres each to actual settlers, and upon the further condition that the lands which were undisposed of at the end of five years should revert to the United States. *Dickins's Lessee v. Mahana*, 276.
12. In 1818, Congress directed these reverted lands to be laid off into townships and sections, or into one-hundred-acre lots, and to be sold, with the exception of the usual proportion for the support of schools. *Ibid.*
13. The Secretary of the Treasury had the power to reserve school lots, but the register of the land office had not. *Ibid.*
14. Whether or not the presumption was that the Secretary had exercised the power, was a question to be decided by the jury upon the evidence. and in deciding that it was a legal presumption the court erred. *Ibid.*
15. By the acts of Congress passed in 1829, (4 Stat. at L., 334,) and 1836, (5 Stat. at L., 79,) commissioners were to be appointed to hear and determine all claims to lots of ground in the town of Galena, Illinois, and to give a certificate in favor of each person having the right of pre-emption. *Morehouse v. Phelps*, 294.

LANDS, PUBLIC, (*Continued.*)

16. Where a person presented his claim as the legal representative of a settler, obtained the certificate, and afterwards a patent to the legal representatives, it inured to the benefit of the person who had presented the claim, obtained the certificate, paid the money, and procured the patent. *Ibid.*
17. Where this person acted for himself individually, and also as the administrator of his co-tenant who was dead, it was his duty and right, under the laws of the State, to pay both shares of the purchase-money. *Ibid.*
18. One standing outside, who took no interest in the claim for many years after it was passed, and then claimed under a deed made by the settler in 1829, alleging that he was the proper legal representative, had not such a title as would enable him to maintain an action of ejectment. *Ibid.*
19. The cases under incipient Spanish titles do not apply to this case, because the United States were the absolute owners of the lots in question, and could dispose of them at their pleasure. *Ibid.*
20. Where there was a petition for land in California, addressed to Micheltoarena, the Governor, which was referred by him to his Secretary, Jimeno, and by him to Sutter, and there is no evidence that these papers, with Sutter's certificate, were ever returned to the Governor, or sanctioned by the authorities of the State subsequently, the evidence is not sufficient to support the claim, although sanctioned by what is called Sutter's general title. *United States v. Nye*, 408.
21. Sutter's general title was this :
22. In December, 1844, Micheltoarena issued a general grant to all persons who had made applications upon which a favorable report had been made by Sutter, and directed Sutter to give them a copy of this order, to serve instead of a formal title. *Ibid.*
23. But this power thus conferred upon Sutter was abrogated by the abdication of the Governor, and, in this case, the power was not executed for more than a year after such abdication. The claim is therefore invalid. *Ibid.*
24. Where there was a petition for land in California to Micheltoarena, in July, 1844, but no final action was taken upon it except under Sutter's general title, (see preceding case of *United States v. Nye*,) the claim is not considered to be sufficiently established. *United States v. Bassett*, 412.
25. Between May, 1829, and July, 1832, there was an interval in the acts of Congress reserving lands from sale which were claimed under Spanish concessions in Louisiana ; and during this interval, an entry or patent for any of these lands would have been valid. *Easton v. Salisbury*, 426.
26. But a patent issued in 1827, whilst the reservation was in force, was void, and the patent did not become operative *proprio vigore* during the interval between 1829 and 1832. *Ibid.*
27. The confirmation of the concession in 1836, therefore, gave a good title to the claimant under the concession. *Ibid.*
28. Moreover, the New Madrid warrant, not being located within one year from the 26th of April, 1822, was void. *Ibid.*
29. The jurisdiction of the board of commissioners for the settlement of private land claims in California, and of the courts of the United States on ap

**LANDS, PUBLIC, (Continued.)**

- peal, extends not only to the adjudication of questions relating to the genuineness and authenticity of the grant, and others of a similar character, but also all questions relating to its location and boundaries; and does not terminate until the issue of a patent conformably to the decree. *United States v. Fossatt*, 445.
30. It is the duty of the surveyor general to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same. *Ibid.*
31. The plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and evidence of an equitable title will not be sufficient for a recovery. *Fenn v. Holmes*, 481.
32. Hence, the holder of a New Madrid certificate, upon which no patent had been issued, and whilst it was yet uncertain whether or not the proposed location of it was reserved under older surveys, could not recover in ejectment. The legal title was in the Government. *Ibid.*

**LIBEL.**

1. A railroad company held responsible for the publication of a libel. *Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley*, 202.

**NOTES, PROMISSORY.**

See **COMMERCIAL LAW.**

**OREGON.**

1. Congress passed no law in any wise affecting title to lands in the Territory of Oregon until September, 1850; and therefore where a controversy arose, in July, 1850, relating to titles to land, neither party could be said to have a legal title. *Lounsedale v. Parrish*, 290.
2. Consequently, the amount in controversy could not be ascertained, so as to bring the case within the jurisdiction of this court; and there is no question arising under the Constitution or laws of the United States so as to give jurisdiction. *Ibid.*

**PATENT RIGHTS.**

1. In the trial of a suit for the violation of a patent right, the court cannot be compelled to receive the evidence of experts as to how a patent ought to be construed. The judge may obtain information from them if he desire it. *Winans v. New York and Erie Railroad Co.*, 88.
2. Winans's patent for "a new and useful improvement in the construction of cars or carriages intended to travel upon railroads," was for the manner of arranging and connecting the eight wheels of a railroad carriage for the purpose of enabling burden and passenger cars to pursue a more smooth, even, and safe course over the curves and irregularities of a railroad. And it was proper to instruct the jury, that if they found, from the evidence, that before the time when Winans claimed to have made the discovery, carriages with eight wheels, arranged and connected substantially in the same manner and upon the same mechanical principles with those described in the patent, were known, and publicly used, Winans was not entitled to recover. *Ibid.*
3. The ultimate object of the patent laws being to benefit the public by the use of the invention after the temporary monopoly shall have expired,

PATENT RIGHTS, (*Continued.*)

- one who conceals his invention, and uses it for his own profit, is not entitled to favor if another person should find out and use the invention. *Kendall v. Winsor*, 322.
4. But this does not include the case of an inventor who forbears to apply for a patent until he has perfected his invention or tested its value by experiments. *Ibid.*
  5. Whether or not an inventor intended to do this, or negligently to postpone his claims to a patent, as, for instance, by acquiescing with full knowledge in the use of his invention by others, are questions which ought properly to be left to the jury. *Ibid.*
  6. If a person should surreptitiously obtain knowledge of the invention, and use it, he would have no right to continue to use it after the inventor should have obtained a patent. *Ibid.*

## PLEAS AND PLEADINGS.

1. The decision of this court in 20 Howard, 227, as to what averment in the declaration is sufficient to give jurisdiction to the courts of the United States, again affirmed. *Covington Drawbridge Company v. Shepherd*, 112.
2. Under the general-issue plea, no question could be raised as to the capacity of the parties to sue in the Circuit Court. *Philadelphia, Wilmington and Baltimore Railroad Co. v. Quigley*, 202.
3. Where it appeared from the record that a party sold land to a railroad company, the price of which was paid in the stock of the company, guarantied by certain persons to be at par after a named time, and suit was brought upon this written contract, the case does not appear to be open to a demurrer by the defendants, and the judgment of the court below sustaining such a demurrer must be reversed. It is an original contract, and, being declared on as such, the plaintiffs are entitled to judgment. *Hill v. Smith*, 284.
4. Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract; and, although the contract be in writing, parol evidence is admissible to show that the agent was acting for his principal. *Ford v. Williams*, 288.
5. The rules of pleading in admiralty must be strictly complied with. The evidence and arguments confined to the points put in issue by the allegations of the libel and denial of the answer. *McKinlay v. Morrish*, 343.
6. The pleadings in another suit, where the parties were different, and the petition and answer signed by counsel, cannot be resorted to for admissions of the respective parties. *Combs v. Hodge*, 397.
7. Where four persons made a contract with a citizen of Ohio, and three of the four were citizens of Indiana, and suit was brought against the three in the Circuit Court of the United States for Indiana, the non-joinder of the fourth was justified by the act of 1839, (5 Stat. at L., 321.) *Clearwater v. Meredith*, 489.
8. The decision at the present term, in the case of *Hill v. Smith*, again affirmed. *Ibid.*



PLEAS AND PLEADINGS, (*Continued.*)

9. A suit could be maintained upon the coupons, without the production of the bonds to which they had been attached. *Knox County v. Aspinwall*, 539.
10. Where a libel was filed by the owners of a steamer against the owners of a propeller for a collision, and there was an agreement between the parties in the court below, that the answer of the respondents should operate as a cross-libel, the mode of proceeding does not meet the approval of this court, and ought not to be drawn into precedent. The respondents should file their cross-libel, take out process, and have it served in the usual way. *Ward v. Chamberlain*, 572.

PRACTICE.

1. Where a common-law case was dismissed at the last term for want of jurisdiction, (the record showing that no final judgment was given in the court below,) an affidavit setting forth that the final judgment was accidentally omitted from the record, and the production of a correct record, are not sufficient to sustain a motion to annul the order of dismissal, and reinstate the case upon the docket. *Rice v. Minnesota and Northwestern Railroad Co.*, 82.
2. After the judgment of this court was passed upon the case, and the term was closed, the function of the writ of error was over, and it cannot now be revived. *Ibid.*
3. The distinction pointed out between a common-law case and a case in admiralty. *Ibid.*
4. The agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a State, regulating the proceedings of its own courts, authorize a District or Circuit Court sitting in the State to depart from the modes of proceeding and rules prescribed by the acts of Congress. *Kelsey v. Forsyth*, 85.
5. Where the parties to an ejectment suit agreed to waive a trial by jury, and that both matters of law and of fact should be submitted to the decision of the court, and then a bill of exceptions was brought up to this court to all the rulings and decisions of the court below, this court cannot look into errors of fact or errors of law alleged to have been committed in such an irregular proceeding, and the judgment of the court below will be affirmed. *Ibid.*
6. A writ of error must be made returnable to the first day of the term, which is now the first Monday in December. If made returnable to any subsequent day, it is erroneous, and will be dismissed on motion. It cannot be amended. *Insurance Co. of Virginia v. Mordecai*, 195.
7. This court has heretofore decided, in several cases, that, in order to bring the questions of law before this court by writ of error, the facts must be found in the court below by a jury, by a general or special verdict, or must be agreed upon in a case stated. *Campbell v. Boyreau*, 224.
8. And also, that where the parties agree that the court shall decide questions both of law and fact, none of the questions decided, either of fact or law, can be reviewed by this court on a writ of error. *Ibid.*
9. The practice in Louisiana is an exception to this general rule, as that prac-

PRACTICE, (*Continued.*)

- tice is sanctioned by the act of Congress which requires the courts of the United States to conform to the practice of the State courts. *Ibid.*
10. Where a deed was objected to in the Circuit Court on the ground of fraud, but no specific grounds of objection were made, this court cannot inquire into the correctness or incorrectness of the objection. *Thomas v. Lawson*, 331.
  11. After a case has been heard and dismissed for want of jurisdiction, because it did not appear that the value of the property in controversy exceeded two thousand dollars, affidavits of its value come too late. *Richmond v. City of Milwaukee*, 391.
  12. The cases upon this point examined. *Ibid.*
  13. Moreover, the value of the property is stated in the proceedings of the court below, and affidavits have never been received here to vary it or enhance it in order to give jurisdiction. *Ibid.*
  14. This court has already decided at the present term (see page 195 of this volume) that a writ of error made returnable on the third Monday in January, and the defendant in error cited to appear on that day, is irregular, and must be dismissed. *Porter v. Foley*, 393.
  15. A motion to remand the case to the court below, with leave to amend the writ of error and citation, cannot be granted. But if the plaintiff in error desires it, he may, in order to save expense, withdraw the transcript, and use it in connection with the proper and legal process to bring the case here. *Ibid.*
  16. An exception taken to the refusal of a judge to sign a bill of exceptions, under the circumstances of this case, requires no further notice. *Martin v. Ihmsen*, 395.
  17. The only cases which will be taken up out of their regular order on the docket are those where the question in dispute will embarrass the operations of the Government while it remains unsettled. *United States v. Fossatt*, 445.
  18. But if the court below, to which a mandate is sent, does not proceed to execute it, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions before this court for correction. *Ibid.*
  19. No appeal will lie from any order or decision of the court below which is not a final decree. *Ibid.*
  20. The decree of the court below, in the present case, was not a final decree. *Ibid.*
  21. After an appeal has been docketed and dismissed under the 63d rule of court at a prior term of the court, the same case cannot again be docketed without a new appeal. *Rogers v. Law*, 526.

## PRESCRIPTION.

1. The ruling of the court below, viz: that prescription was interrupted by a litigation which was pending between the parties shortly before the present suit was instituted, was, under the circumstances of the case, correct. *Martin v. Ihmsen*, 395.

RAILROAD COMPANIES.

See CORPORATIONS.

1. A railroad company is responsible in its corporate capacity for acts done by its agents, either *ex contractu* or *in delicto*, in the course of its business and of their employment. *Philadelphia, Wilmington, and Baltimore Railroad Co. v. Quigley.*
2. It is responsible, therefore, in an action for the publication of a libel. *Ibid.*
3. It is within the course of its business and the employment of the president and directors, for them to investigate the conduct of their officers and agents, and report the result to the stockholders. *Ibid.*
4. But a publication of this report must be made under the conditions and responsibilities that attach to individuals under such circumstances. *Ibid.*
5. In the absence of any malice or bad faith, a report to the stockholders is a privileged communication. But this privilege does not extend to the preservation of the report and evidence in a book for distribution amongst the persons belonging to the corporation, or the members of the community. *Ibid.*
6. So far, therefore, as the corporation authorized the publication in the form employed, they are responsible in damages. *Ibid.*
7. But the instruction of the Circuit Court was erroneous, holding the corporation responsible for a publication which took place after the commencement of the suit. Also an instruction allowing the jury to give exemplary damages, because there was no evidence that the injury was inflicted maliciously or wantonly. *Ibid.*
8. Under the general-issue plea, no question could be raised as to the capacity of the parties to sue in the Circuit Court. *Ibid.*
9. Bonds issued by a railroad company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the Circuit Court of the United States for Massachusetts. *White v. Vermont and Massachusetts Railroad Co.*, 575.
10. The eleventh section of the judiciary act does not apply to such a case. *Ibid.*
11. The usage and practice of railroad companies, and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments. *Ibid.*
12. The later English authorities upon this point overruled. *Ibid.*

SURETIES UPON A BOND.

1. There was a suit brought in the Circuit Court of the United States for the southern district of Mississippi, against a sheriff and his sureties upon the sheriff's official bond, in which judgment was given for the defendant. Being brought to this court by writ of error, the judgment was reversed, and a mandate went down, directing the Circuit Court to enter judgment for the plaintiffs. (See 2 Howard, 28.) *Leggett v. Humphreys*, 66.
2. Whilst the suit was pending in this court, judgment against the sheriff

**SURETIES UPON A BOND, (Continued.)**

and his sureties was given in a State court, and execution was issued against one of the sureties, by means of which his property was sold and the amount of the penalty of the bond collected and paid over. *Ibid.*

3. When the mandate of this court went down, the Circuit Court entered judgment against the surety, who filed his bill in equity for relief. This suit also was brought up to this court, who decided that the complainant was entitled to relief. (See 3 Howard, 313.) *Ibid.*
4. Further proceedings in this case render it necessary for this court now to decide—

The obligation of the surety is *strictissimi juris*, and he cannot be called upon to pay more than the penalty of his bond. *Ibid.*

As he was not permitted to plead *puis darrein continuance*, the satisfaction of the penalty of his bond, &c., he is entitled to relief in equity. *Ibid.*

The obligor in a bond has a right to convey property for the purpose of indemnifying his surety, provided it be done *bona fide*, and there is no lien upon the property of the obligor. *Ibid.*

**TARIFF.**

See DUTIES.

**TELEGRAPH COMPANIES.**

1. Where there was a telegraph company from Baltimore to Wheeling, with branches to Washington and Pittsburg, and another company from Pittsburg to Philadelphia, and from Harrisburg to Baltimore; and the former company complained that the latter received messages at Philadelphia, sent from Pittsburg and Wheeling, directed to Baltimore and Washington; and there was no direct infringement of the patent right, nor any violation of a contract, the case is without a legal remedy. *Western Telegraph Co. v. Magnetic Telegraph Co.*, 456.
2. Every person is at liberty to use a circuitous route, if he prefers it to a shorter route. *Ibid.*

**TENNESSEE.**

1. The certificate of probate of a deed in Tennessee did not say that the witness swore that the grantor acknowledged it on the day of its date. But as the certificate said that the grantor acknowledged it for the purposes therein contained, the probate is covered by an act passed in 1846. *Lea v. Polk County Copper Company*, 494.
2. The Tennessee act of limitations construed. *Ibid.*

**VIRGINIA.**

1. Where there had been an original entry for land made in the office of the lord proprietor of the Northern Neck of Virginia, a survey ordered upon that entry, and actually made and returned, and a patent adopting that survey, and founded thereupon, was issued by the lord proprietor to a grantee differing in name from the maker of the original entry, these circumstances constitute no ground for vacating or impeaching the legal title vested by the patent. *Brown v. Huger*, 305.
2. By an act of Congress, passed on the 3d of March, 1835, (4 Stat. at L., 771,) a certain quantity of land was appropriated to the satisfaction of

VIRGINIA, (*Continued.*)

Virginia military land warrants, with a proviso that if the land was not enough to satisfy the warrants, a distribution should be made *pro rata*, in full satisfaction of the warrants. Under it a dividend of ninety per cent. was made. *Walker v. Smith*, 579.

3. In 1852 (10 Stat. at L., 143) another act was passed, providing for the deficiency of ten per cent., and directing the Secretary of the Interior to issue land scrip in favor of the "present proprietors" of any warrant thus surrendered. *Ibid.*

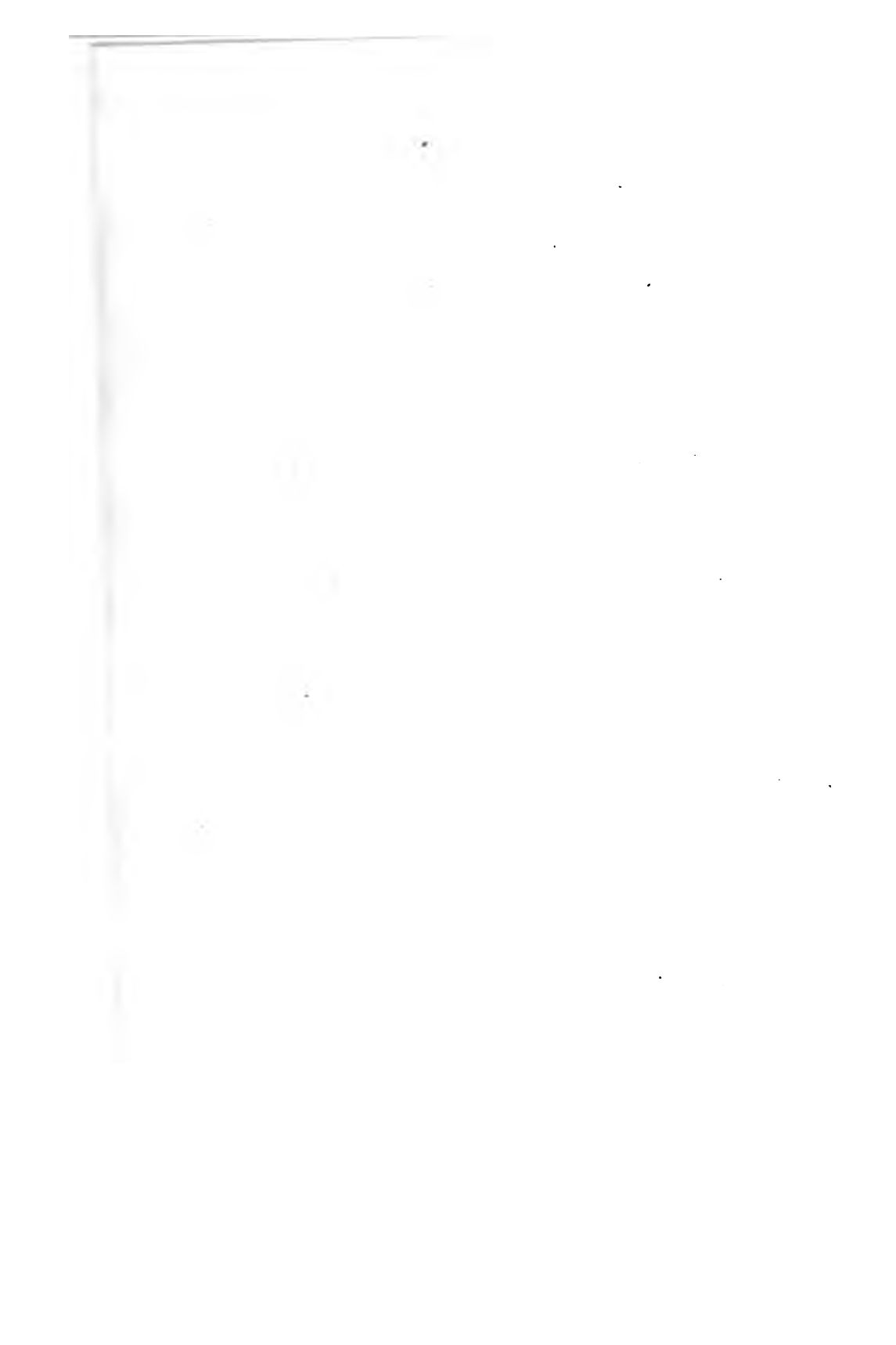
4. A bill in chancery for an injunction to prevent the Secretary from issuing the scrip to one of two claimants cannot be sustained. The Secretary must decide, and then it becomes a chose in action, upon which a court can act. *Ibid.*

## WISCONSIN.

1. There being no special provision in the act of Congress regulating appeals from the District Court of the United States in Wisconsin, they are governed by the general law of 1803; and by that act no appeal will lie unless the sum or value in controversy exceeds two thousand dollars. *Richmond v. City of Milwaukee*, 80.













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